

HUMANITARIAN CONSIDERATIONS FOR THE CIVILIAN
VICTIMS OF WAR IN LIGHT OF THE REALITIES
OF MODERN ARMED CONFLICTS

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I

THE NEED FOR THE PROTECTION OF THE CIVILIAN
POPULATION¹

A. Introduction to the areas of protection

War, as it becomes more and more total, annuls the difference which formally existed between armies and civilian populations in regard to exposure to injury and danger.²

Max Huber

The words of Max Huber, former President of the International Committee of the Red Cross, speaking at the opening session of the 1949 Geneva Convention ring true with history. As nations have perfected the methods of waging war on each other the destruction of human life has been a burden which has been increasingly carried by the civilian population. The days of knights engaging in personal duels and of professional armies clashing on the field of battle separate and apart from the noncombatant element is a thing of the past. The totality of modern warfare has involved the civilian population whether willingly or not. It is estimated that in Austria and Germany during World War I there were 10,000,000 civilian dead with an equal number of

military victims. In World War II of the estimated 60,000,000 deaths from combat operations, 43,000,000 were civilians and in the Korean Conflict the ratio of civilian to military deaths had risen 4 to 1.³ The reasons for the increased ratio of civilian victims are many. New military techniques such as aerial bombardment have decreased the discrimination between the combatant and the noncombatant victim. Weapons of mass destruction can, in a single blow, bring total havoc to an entire area and additionally, as the civilian population has become more involved in the support of the war efforts of their respective nations they have removed themselves from the category of mere pawns of war.

The need for the protection of civilians can be divided into three areas. First is the need for protection from direct attack and for protection from the collateral consequences of military operation conducted in the proximity of their homes. Secondly is the need to protect civilians in occupied territories and finally the need to protect civilians who are interned as a result of the hostilities.⁴ Each of these areas presents special problems of protection. Also, cutting across all three areas is the question of the desirability of providing unique protection to special groups such as women, children, persons engaged in civil relief efforts, medical personnel and local police forces. This paper will focus its attention on the need for the re-evaluation of the protection offered to the civilians in the first mentioned area; the need for protection of the civilian from the suffering caused during the initial phases of an

armed conflict, protection which should be granted to the entire civilian population regardless of their special category. While it is difficult to separate the emotional aspects of offering special protection to those victims who are the least able to protect themselves this should not obfuscate the urgent need to develop viable protection for all persons. The statistics are self evident.⁵

To discuss new rules implies a lack of current standards. As Professor Lauterpacht states in discussing the 1949 Geneva Conventions

. . . there may be a tendency, when we speak of the necessity of the revision of the laws of war, to leave out of account the fact that these four conventions have already revised a very substantial part of the law of war and that they not only have revised it but have also expanded it in many respects out of all recognition.⁶

Thus the problem is more than the establishment of new rules but the creation of an awareness of the humanitarian considerations necessary for survival in a modern society. We must reflect this new awareness as we approach these new problems.⁷

The decline of our civilization may well be measured by reference to the growing gaps between human ideals solemnly affirmed in international instruments and the growing brutalization of civilians in armed conflicts. It can be measured by reference to the ever more frequent disregard of the unchallenged rule of international law that noncombatants must not be made the object of attacks unrelated to military operations and directed exclusively against them.⁸

B. The Blurring of the Civilian Population with the Combatant

The distinction between the noncombatant civilian

population and the combatant forces is not a concept embedded in the history of warfare. The ancient ideas of war, up until the middle ages, treated all persons; combatants, non-combatants, women and children as objects of warfare, "as actual enemies subject to slaughter".⁹ The slaughter of the civilian population, which may run contrary to the humanitarian instincts of modern man, was the normal custom during the Roman period.¹⁰ The philosophy of war was to completely destroy the will to resist. Thus in the time of Alexander the Great "fruit trees were cut down, cornfields were trampled, houses were burned, every kind of wanton ravage was brought . . ."¹¹ until the military object could be achieved. Whatever rules existed were rules based only upon the military necessity of the operation and not upon any sentimentality.¹²

The circumstances of modern armed conflict have changed the ancient concepts. Definite rules of war have been developed. The purpose of these rules, as set forth by the United States Department of the Army, are to diminish the evils of war by:

- (a) Protecting both combatants and noncombatants from unnecessary suffering;
- (b) Safeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly . . . civilians; and
- (c) Facilitating the restoration of peace.¹³

Basic to the rules are three guiding principles, military necessity, humanity and chivalry.¹⁴ Thus the purpose and

basic principles have been to reduce the suffering of war and to confine the conflict to the combatant participants. But drafters of any rules have been faced with the difficulty in drawing the "rigid line which used to divide members of the combatant forces and civilians."¹⁵ This problem is intensified by the growth of the numbers of noncombatants engaged in activities which are connected with the prosecution of the war effort and this has done much to "blur the distinction between combatants and noncombatants" in modern times.¹⁶ This blurring, caused by the increased participation of the civilian community in the activities of warfare, is added to by the fact that wars are no longer "fought by professional armies in the interest of absolute monarchs"¹⁷ but that warfare has developed into conflict between peoples in which it is increasingly difficult to view the interstate armed conflict as strictly restricted to battles between these professional armies.¹⁸

The civilian population, the traditional noncombatants, has, with the development of aerial warfare, made advances in the mass destruction instruments of warfare such as the atomic bomb, guided missiles, smart bombs, and has been drawn completely into the mainstream of warfare and is subject therefore to dangers similar to those which face the combatant forces.¹⁹ The civilian is drawn into the conflict not solely because of the inability of aerial bombardment to discriminate between its victims nor because of technical advances in weaponry but also because of an increased national self identification and political awareness which makes the

civilian somewhat of a voluntary participant in wars.²⁰

This trend has been noted by Professor Greenspan when he stated:

Symptomatic of the engagement of the whole population in war, World War II showed a significant rise in the importance of guerrilla warfare. Some nations, overrun and occupied by the Axis Powers, were only able to continue the war by the use of guerrilla or resistance movements.²¹

While this trend presents serious problems in the redefining of the rules of war, problems which were not anticipated or if anticipated side stepped by the drafters of the Hague Regulations in 1899 and 1907, as well as the drafters of the 1949 Geneva Conventions, they are not the problems of immediate concern. Needed is adequate protection for the civilian who is not an active participant in the conflict, the individual whose only participation is that he is an inhabitant in an area of the conflict. The immunity of such noncombatants from direct attack is one of the fundamental rules of the International Law of War.²² But such a fundamental principle has proven inadequate as is evident by the increasing percentage of civilian deaths in each armed conflict. Deaths caused not necessarily by direct attacks but by the side effects of such direct attacks. As stated by Jean Pictet:

[M]an's two main instincts, that of self preservation and that of destruction, though apparently opposed, are at times linked. The instinct of self preservation must resort to aggression, if it is to triumph. Man will therefore seek to kill, and to make others suffer as a result, in order to increase by that much more his own chances of survival. In his fellow man he sees a rival.

Among animals, the strong oppresses the weak, just as for thousands of years men obviously did the same. Later the defense reaction was extended to the group.

To make community life possible, society had to be organized. Since it was impossible to change man's nature, his instincts had to be curbed and he compelled to accept reasonable solutions. The group, by a decisive resolution, thus established a social order based upon certain moral rules.²³

II

GENERAL SURVEY OF INSTRUMENTS OF PROTECTION
OFFERED BY THE COMMUNITY TO PARTICIPANTS
AND NON-PARTICIPANTS OF ARMED CONFLICTS

A. Non-Specific Instruments of Protection

(A)s a logical outgrowth . . . the idea developed that only those who are actually able and willing to participate actively in warfare ought to be the objects of deliberate armed action . . . This tendency toward humanization of warfare . . . culminated in the great multi-lateral treaties of the nineteenth and early twentieth century.²⁴

Hans J. Morgenthau

Early attempts to limit the suffering of the victims of war were not designed to specifically provide protection to the civilian population. Any protection they received was an outgrowth of the protection put forth in other areas. The concern of the decision makers was not directed toward the noncombatant. This was in part based on the European view that war was struggle between states not peoples.²⁵ At this time the humanitarian views of the twentieth century had not come into prominence. Concern was for the suffering of the combat victims of war, that is, the soldier in the field. To achieve protection for the soldier in the field attempts were made to control the instruments of warfare. The first part of what was to later become the Law of the

Hague was developed at St. Petersburg in 1868. Czar Alexander II convened a conference for the purpose of "alleviating as much as possible the calamities of war."²⁶ The aim of St. Petersburg was set forth in the preamble:

The only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy.²⁷

In actuality the results of St. Petersburg, known as the St. Petersburg Declaration of 1868, were a multi-lateral disarmament treaty which restricted the use of any projectile below the weight of 400 grams which was either explosive or charged with fulminating or inflammable substances.²⁸ But the Declaration is of more significance than as a mere disarmament agreement. It marks the appearance of rules based upon the humanitarian desires of nations to limit the weapons of war because of the suffering they could inflict.²⁹ By prohibiting the use of certain weapons nations would try:

. . . to infuse into warfare a spirit of decency and of respect for the common humanity of all its prospective victims and to restrict violence to the minimum compatible with the goals of war; that is, breaking the enemies will to resist.³⁰

In 1863, during the American Civil War, Professor Francis Lieber of the Columbia College of New York published his famous work Instructions for the Government of Armies of the United States in the Field.³¹ This work was the first effort at codifying the various rules of custom and usage in warfare into an authoritative code. As the order stated, "as civilization has advanced during the last centuries, so has steadily advanced, especially in war on land, the distinction

between the private individual belonging to a hostile country and the hostile country itself, with its men in arms.³² This General Order was issued over the signature of President Lincoln for the guidance of the Union Armies in the conduct of the Civil War. Its significance transcends that conflict because it instituted a trend which lead to other nations issuing similar codifications.³³ The Lieber Code was replaced in 1914 by an Army Field Manual which updated, is still in force today.³⁴ This manual is entitled "The Laws of Land Warfare."³⁵

The ultimate in international accords not specifically designed to be for the protection and amelioration of the conditions of civilians during time of war was the Treaty for the Renunciation of War As An Instrument of National Policy (Kellogg-Briand Pact) of 1928.³⁶ The result of adherence to such a pact would have of course mooted the necessity of developing specific protections. The treaty shows the growing humanitarian concern during the period between the Great Wars. The plenipotentiaries were "(d)eeply sensible of their solemn duty to promote the welfare of mankind."³⁷ Notwithstanding this deep sensibility, in little more than ten years the world was again plunged into a conflict which ultimately would take the lives of 43,000,000 civilians. Empirically, the approach of the Kellogg-Briand Pact was ineffective.

B. Specific Instruments of Protection

The publishing in 1861 of Henry Dunant's pamphlet

A Memory of Solferino recalling the French and Sardinian campaign against Austria in 1856 in which 38,000,000 officers and men were killed in the space of fifteen hours caused the "Societe d'Utilite Publique" of Geneva, to establish in 1863 a committee to study some of the proposals set forth by Dunant for the protection of war wounded.³⁸ The committee proceeded to convene an international conference of sixteen European nations. This conference established the Red Cross movement.³⁹ In the following year, 1864, the Swiss government extended an invitation to all European nations and certain American nations to attend an international congress for the purpose of establishing a treaty relative to the protection of the wounded in time of war. The congress drafted the Convention For The Amelioration Of The Conditions Of Soldiers Wounded In Armed Forces In The Field Of 1864.⁴⁰

While this treaty dealt primarily with the protection of hospitals, ambulances and other medical services for the amelioration of war wounded soldiers it did provide, in Article 5, that "[i]nhabitants of a country who may bring help to the wounded shall be respected and shall remain free." By 1867 all the "Great Powers", with the exception of the United States, had ratified the treaty. In 1882 the United States ratified the treaty and it could therefore be said to have gained, at that time, universal acceptance.⁴¹

Following the Red Cross Convention of 1864, and the St. Petersburg Declaration of 1868, the Russian Government once more called an international conference for the purpose of discussing International Rules on the Law and Usages of War.⁴²

The outcome of this conference was the Brussels Declaration. This declaration, signed by all the plenipotentiaries of the conference, failed to receive governmental ratification.⁴³ While the Declaration was not internationally effective because of this lack of ratification it is significant in that it is considered to be authoritative of the laws of war as they existed at that time and, further, it formed the basis of the convention with respect to the laws and customs of war which was drafted at the first Hague Peace Conference in 1899.⁴⁴

The Hague Peace Conferences of 1899 and 1907, form an important link in the evolution of the protection of the civilian although these conferences did not deal directly with this subject. Under the personal instigation of Czar Nicholas II the first Hague Peace Conference was convened on May 18, 1899.⁴⁵ The conference soon abandoned its attempt to limit armaments but did lay down three important prohibitions:

- (1) To prohibit the launching of projectiles and explosives from balloons or other similar new methods.
- (2) To prohibit the use of projectiles, the only object of which is the diffusion of asphyxiating or deleterious gases.
- (3) To prohibit the use of bullets which expand or flatten easily in the human body, such as bullet with a hard envelope, of which the envelope does not entirely cover the core or is pierced with incisions.⁴⁶

The main task of the first Hague Conference was the establish-

ment of regulations respecting the laws and customs of war on land, the basis of which was primarily the Brussels Declaration.⁴⁷

The final act of the conference recommended the convening of a second conference to complete the work of the first conference. This second conference was held eight years later on June 15, 1907, mainly at the insistence of the government of the United States.⁴⁸ The regulations regarding the Laws and Customs of War became the fourth convention of the thirteen conventions enacted in the final act of the conference.⁴⁹

The Hague Conventions were from their inception defective. The inadequacies of these laws of war, as evidenced during the First and Second World Wars, were a "consequence of the radical change of general conditions as compared with those prevailing in 1899 and 1907."⁵⁰

The events of the First and Second World Wars were the basis in 1949 for the first adequate attempt to bring protection to the civilian victims of war. It was an attempt, as stated by Jean Pictet, to "not confine itself . . . to protecting people who had already become victims of war - the wounded, prisoners or internees; it had to prevent such persons from becoming victims."⁵¹ In the Second World War the existing laws of war "were regularly and on a mass scale violated by all the belligerents."⁵² Most of the belligerents forgot the rule of Article 22 of the IV Hague Convention that the belligerent did not have the right to use unlimited means for injuring the enemy. For decades the International

Committee of the Red Cross had, in the face of "frequent lack of understanding on the part of the authorities",⁵³ been attempting to formulate stronger rule for the protection of all war victims.⁵⁴ On April 21, 1949, the Swiss Government⁵⁵ opened a diplomatic conference attended by some sixty one states.⁵⁶ On August 12 of the same year seventeen delegates signed four conventions, others signed at a special meeting called for that purpose on December 8, 1949.⁵⁷ The first convention was entitled the "Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in the Armed Forces in the Field"⁵⁸ and was a revision of a similarly named convention signed in 1929. The second convention was the "Geneva Convention of the Amelioration of the Conditions of the Wounded and Sick and Shipwrecked Members of the Armed Forces at Sea"⁵⁹ and was a revision of the Tenth Hague Convention of 1907, for the adaptation to Maritime Warfare of the Geneva Convention of 1906. The third convention was the "Geneva Convention Relative to the Treatment of Prisoners of War"⁶⁰ and revised another similarly named convention of 1929. The fourth convention and "perhaps the most important of the group"⁶¹ was the "Geneva Convention Relative to the Protection of Civilian Persons in Time of War."⁶² This fourth convention "was entirely new"⁶³ and covered ground not touched by the Hague Conventions.⁶⁴ As pointed out by Jean Pictet,

it must be noted, however, that the Fourth Geneva Convention protects civilians only against abuses of power by the enemy authority. It does not come within the sphere of the law of war and the use of weapons, with the important exception

of the provisions protecting hospitals against all attacks.⁶⁵

Notwithstanding Mr. Pictet's caveat, the changes introduced by the convention did go beyond the mere extention of the category of protected persons. The convention abolished reprisals against civilians and their property and did away with such customary rules as existed in the matter of taking hostages.⁶⁶ The Convention further set forth "minimum obligations of human treatment even in armed conflicts which are not of an international character."⁶⁷

The first part of the fourth Geneva Convention deals with the general protection of the civilian population against the effects of armed conflict. The second part sets forth rules for the protection of persons in belligerent and occupied territory. The final part of this Convention concerns enemy and alien civilians in belligerent countries.

While the Fourth Convention was a "great step forward in the development of international law"⁶⁸ some of the provisions are merely permissive or voluntary. A few examples:

- (1) In time of peace or after hostilities parties may establish hospital and safety zones . . . Article 14
- (2) Any party to the conflict may . . . propose . . . to establish . . . neutralized zones . . . Article 15
- (3) Shall endeavor to conclude local agreements for the renewal . . . of wounded, sick . . . Article 17⁶⁹

The permissive character of these rules are their weakness.

III

PROTECTION FROM THE COERCION PROCESS UNDER
EXISTING INTERNATIONAL LAW

For the last one hundred years the community decision makers have been attempting through various agreements to bring order to the area of armed conflict. In the words of Professors McDougal and Feliciano:

A . . . major objective (sought by authoritative decision makers in the resolution of conflicting claims respecting coercion) is the reduction to the minimum, when the process of persuasion breaks down and violence is in fact resorted to, of unnecessary destruction of values.⁷⁰

Notwithstanding this objective

[T]he laws of war are observed because generally speaking and by and large they help protect the interests of both parties and promote the efficiency of military operations. Whenever any of the laws of war have been found to be a definite and permanent obstacle to the achievement of the objectives of war the sanction of the community interest and the reason for the continuance of the rule has disappeared and the rule has not long been observed. (Emphasis added)⁷¹

Even though there has been great vacillation in the rules of war and the protection offered by them, certain minimum standards have emerged in contemporary international law. The emphasis of these rules has been towards the protection of the combatant both during the period that he is an active participant in a conflict and especially after he ceases his active role, i.e. becomes wounded, sick or a captive. But for the

provisions of the Fourth Convention of 1949, the protection offered to the civilian population has been a spin off from protections offered in other areas.

A. Claims Concerning the Protection of Individuals

The basis of the traditional laws of war has been a distinction between combatants and noncombatants. It is stated by the United States Department of the Navy in its publication governing the Laws of Naval Warfare that:

In accordance with this distinction the population of a belligerent is divided into two general classes; the armed forces (combatants) and the civilian population (noncombatants). Each class has specific duties and rights in time of war and no person can belong to both classes at the same time.⁷²

Further,

[u]nder customary international law, individuals who do not form a part of the armed forces and who refrain from the commission of all acts of hostility must be safeguarded against injury not incidental to military operations directed against combatant forces and other military objectives.⁷³

Thus the civilian population, the noncombatant is not a "legitimate military object"⁷⁴ and not subject to "direct attack unrelated to a military objective or of attack . . . for the purpose of terrorization".⁷⁵ The civilians do not, however, enjoy an absolute immunity.⁷⁶ Article 22 of the IV Hague Regulation provides that the right of belligerents to adopt means of injuring the enemy is not unlimited. This prohibition is contained in the second section of those regulations covering hostilities and deals with the means of

injuring the enemy. As such it, in the traditional sense, is directed toward the injury of the combatant participant. Notwithstanding its emphasis and in light of the modern tendency to consider wars not as between states but as between peoples, this article has a basis in the advancement of protection for civilians as well as combatants. However, the ultimate goal should remain not the limitation of the means to injure the civilian but rather his or her complete protection.

The IV Hague Regulation did provide more specific protection for the non-combatant population. It forbid the compelling of the inhabitants of occupied territories to "swear allegiance to the hostile power."⁷⁷ It provided that "family honor and rights, the lives of persons, and private property, as well as religious convictions and practices must be respected."⁷⁸ It formally forbid pillage⁷⁹ and it provided further that "no general penalty, pecuniary or otherwise," should be "inflicted upon the population on account of the acts of individuals for which they could not be regarded as being jointly or severally liable."⁸⁰

All these articles provided a general protection to the civilian but they did not provide for specific protection from the destruction of human values when he was caught in the actual horrors of combat. Such protection was extended only in a limited scale by Articles 25 and 26. These articles provided that the attacking of undefended places was prohibited and further that before the commencement of bombardment, not connected with an actual assault, warning

must be given to the local authorities. Nevertheless such regulations were not designed to specifically provide protection for the civilian population. As noted previously the Fourth Geneva Convention of 1949 was the first attempt to deal directly and specifically with this problem.

Who are the persons protected by this Fourth Geneva Convention? The governing provision is Article 4. As stated by Colonel Draper:

The class entitled to claim protection is wide, embracing all persons who find themselves in enemy hands. Nevertheless certain exceptions exist and are pertinent when considering whether a "grave breach" has been committed. "Grave breaches" can only occur in respect of persons or property protected by the convention. Excluded from protection are all nationals of a party not bound by the Convention. Likewise certain nations of a Contracting Party may be excluded from the protection of the Convention. For example those nationals of a neutral state in the territory of a belligerent state and also the nationals of a co-belligerent, are not protected persons under the Convention for as long as the state of which they are nationals has normal diplomatic representation in the state in whose hands they are.⁸¹

Even though there are certain exceptions to the protection offered and certain classes of individual excluded from the scope of the convention, the entire convention should be given as liberal an interpretation as possible so as to achieve the humanitarian objectives sought by the drafters.

Therefore, in determining the applicability of the Conventions their purpose of extending humanitarian protection to all war victims must be considered. They were not intended to benefit states but individuals and should always be interpreted to effect this purpose. The result of denying the applicability of the 1949 Geneva Conventions in a given coercion situation will be that the war victims involved will be left virtually unprotected and the purpose of the international decision makers in drafting the convention will be defeated.⁸²

The purpose of the Convention is thus not to protect all civilians in time of war but rather to protect certain categories of persons who had been determined to have been placed under special disabilities.⁸³ The second part of the Convention, however, has a wider application. Articles 13 through 26 afford general protection to the civilian population against the consequences of war.⁸⁴ Articles 14 and 15 provide for the permissive establishment of hospital safety and neutral zones. They seek to shelter "from the effects of war certain classes of people who take no part in the hostilities and perform no work of a military character."⁸⁵ The protected persons are once again entitled in all circumstances to respect for their person, their honor, their family rights, their religious convictions and practices and their manners and customs.⁸⁶ Special protection is also set forth in Article 27 for women against attacks on their honor.

B. Claims Concerning Areas of Operations

At the present time belligerent operations may be conducted in any areas except those territories of neutral nations or those areas which the community of nations through multilateral conventions has designated as special areas of protection. As technological advances open new areas to the exploration of man the arenas of operations also expand. Today we are not only concerned with the actualities of armed conflict on the land and sea masses of the world but of the possibility of conflict taking place under the sea, in the air spaces of nations and in outer space. Because the

population of the world is confined, at the present time, to the land area of the globe it is the restriction of operations therein which must be of the most immediate concern.

The limitation of the permissible areas of belligerent operation has "given specific expression to the general humanitarian principle in terms of a policy of limiting the locale of violence."⁸⁷ The neutral nations have by customary international law been excluded from the permissible areas for the conduct of belligerent operation. Such exclusion is significant in that it establishes large areas of safety which can be used for the protection not only of the population of the neutral areas but also as refuge for persons attempting to flee combat taking place in authorized areas of operation. The use of such neutral nations will be discussed subsequently but it suffices to say that such nations cannot under the present state of international law open their doors and accept the entire population of belligerent nations for in so doing they would certainly be unwillingly drawn into the conflict.

Within the permissible areas of operation of belligerent activities the world community, under existing international law, has established certain areas the purpose of which is to afford protection for the civilian populations. Utilizing the basic premise of the Fourth Hague Regulation; that the means of inflicting injury on the enemy is not unlimited,⁸⁸ the international community has sought to establish within the permissible areas of operation the machinery for the

establishment of areas of immunity. Thus in Article 14 of the Civilian Convention of the 1949 Geneva Convention it is provided that in time of peace or after the outbreak of hostilities the parties may establish within their own territories hospital and safety zones and, additionally, localities organized for the protection of the sick and wounded, the aged, children and expectant mothers. The Convention⁸⁹ further provides that the parties to a conflict may through written negotiated agreement establish zones of neutrality within the areas of permissible operations where the fighting is taking place. Such areas are intended for the protection of all sick and wounded combatants or non-combatants as well as those civilians who are taking no active part in the conduct of the belligerent operations.

The humanitarian motives behind such provisions are clear but they suffer the weakness of only being permissive in nature. High humanitarian goals in time of peace even though they be motivated by recent and vivid memories of the horrors of war tend to lose their luster when nations once more engage in conflict. While hospitals have received general protection throughout the course of conflicts the attempts to establish comparable safety localities have "met with much less success."⁹⁰

The international community has attempted to establish rules which would facilitate the establishment of such zones of immunity within the permissible areas of operation. The opening article of the Third Hague Regulation⁹¹ stated:

The Contracting Powers recognize that hostilities

between themselves must not commence without previous and explicit warning, in the form either of a reasonable declaration of war or an ultimatum with declaration of war.

With such a warning, authorized zones could be established and adequate notification of their location given. Protection is given the opposing belligerent power from the fear that such zones might be used to illegally protect legitimate military objectives. Article 28 of the Civilian Convention specifically provides that the presence of protected persons may not be used to render certain points or areas immune from military operations.

A serious problem in the establishment of zones of immunity within permissible areas of operations is that of establishing such zones during armed conflicts not of an international nature. The regulations referred to above apply, in general, to armed conflicts between contracting parties and are thus of an international character. But in the non-international conflict the only protection offered is that found in Article 3 of the Conventions.⁹² The protection of certain human rights is the chief purpose of Article 3 just as it is, in more detail, in the other articles dealing with the protection to be offered in a conflict of an international nature. The minimum standards established in Article 3 do not provide for the details of such zones of immunity as well as the details of other basic provisions. Since the purpose of all the rules is humanitarian the words of Professor Bond are particularly pertinent:

The language of Article 3 is unfortunately general, but selective incorporation of the more

detailed rules of the Geneva Conventions can flesh out its general language. While it is true that the legislative history of Article 3 shows no intent to incorporate all the Convention provisions their purpose was identical; to ameliorate the sufferings of war. And it is the nature of the suffering to be alleviated, not the nature of the conflict that should define the application of the laws of war . . .⁹³

C. Claims Concerning Weapons of Attack

War has through the years become an instrument of national policy for most of the civilized nations of the world. Few nations have had the courage to declare their permanent neutrality and to successfully carry through such a national policy. The notable exception has been the Swiss. However, even in this case the neutrality was guaranteed initially only by the force of other nations. It was the Declaration of Vienna in which the Austrians, French, British, Prussian and Russian governments guaranteed the integrity of Switzerland.⁹⁴ The Swiss status of neutrality has been carried through into their constitution.⁹⁵ But such action by a nation has serious drawbacks in the world community of today. Because of her neutrality Switzerland was unable to adhere fully to the collective defense provisions of Articles 11 through 16 of the Covenant of the League of Nations and was accepted for membership only by reason of a special resolution.⁹⁶ Today she is not a member of the United Nations. Her action has excluded her from the community enlightenment process although, in fairness, it must be stated that the uniqueness of her position has diminished greatly the disadvantages which might have accrued from her exclusion from such a community organization

as the United Nations.

Realizing the need to control the weapons of war, nations have engaged in numerous attempts to ban specific weapons and to limit, both quantitatively and qualitatively, certain weapons of war. The ultimate objective of such efforts can be easily cast in the mantle of humanitarianistic considerations. The attempts of the nations of the world to control the weapons and means of waging war are as long and varied as the wars that they have tried to control. Probably the first recorded effort to limit man power and the weapons of war was an agreement reached in 600 B.C. between the warring Chinese states in the Yantze valley.⁹⁷ This agreement resulted in a period of peace which lasted for more than 100 years. While attempts such as this early effort by the Chinese have been successful in postponing the real dangers of war, others have had little success in getting off the ground. As the methods of engaging in war have become more sophisticated the necessity of controlling these methods has become more imperative. Weapons of mass destruction have the power to destroy without discrimination the participants and the non-participants in a conflict.

The first modern attempt to formally control arms was the St. Petersburg Declaration of 1868, which, on a multi-lateral basis, restricted the use of any projectile below the weight of 400 grams that was either explosive or charged with fulminating or inflammable substances.⁹⁸ This conference and the resulting declaration marks the appearance of rules based upon the humanitarian desires of nations to limit the

weapons of war because of the suffering they might inflict.⁹⁹ The efforts of the St. Petersburg Conference were followed by two "peace" conferences held at the Hague in 1899 and 1907. The conference of 1899 attempted to limit several types of weapons, gun powder and the submarine but was only successful in producing a prohibition on aerial bombardment (the Balloon Declaration).¹⁰⁰ By the time of the second conference in 1907, the popular wave of support for disarmament had subsided. With the public no longer calling for active arms control and with the technical advances that had been achieved or were foreseen in the use of the aircraft as military weapons, adherence to the Balloon Declaration by the participants of the conference declined.¹⁰¹ The IV Hague Regulation did forbid the employment of poison and poison weapons and the use of arms, projectiles or material calculated to cause unnecessary suffering.¹⁰²

By and large the attempts to control weapons, certainly one of the most effective means of reducing harm to those involved in conflict, has been ineffective. It is ably put by Dr. Royce in his book Aerial Bombardment and the International Regulation of Warfare.

Historically only weapons regarded as obsolete, marginal or indecisive and militarily ineffective - weapons which did not or could not be expected to yield a substantial net military advantage after discounting the concomitant destruction of values, such as poison arms or expanding bullets- have been successfully proscribed.¹⁰³

The greatest threat to the civilian population in modern armed conflict is the use of aerial bombardment as a weapon of war. As wars have progressed the protection of civilians

from the destruction of values caused by bombardment has become less and less.

That result was not due merely to the reciprocal adoption of the practice of reprisals. It was due to the general acceptance of a motion of military objective capable of an enlargement so vast as to lose in fact any legally relevant content.¹⁰⁴

D. Claims Concerning Objects of Attack

What is a legitimate object of attack is often in the eye of the beholder. The attacking belligerent claims that the object is of military significance whereas the defender claims that the act was a wanton disregard for human values and designed merely to terrorize the population. The status of objects is clear when it is a tank moving down a road. The status of the object becomes less clear when it is a factory in the center of a populated area or a field of wheat which could be used to feed the army or the civilians. As stated by Professor McDougal and Feliciano:

The underlying principles which seek to regulate target selection are, once again, the principle of military necessity and of minimum destruction of values. Military necessity finds expression in the specific prescription that, most generally characterized, permits the exercise of violence against objects constituting substantial bases of enemy power and utilized in prosecuting or resisting the political demands at stake in the conflict. The countervailing humanitarian principle is observable in the limitations that operate to prohibit both the projection of violence against objects which are not substantial elements of enemy power and the continuation of violence against objects already rendered ineffective . . .¹⁰⁵

Certainly the soldier and those participants actively engaged in the prosecution of the war effort become legitimate

objects of violence. Professor Lauterpacht in writing on the need for revision of the laws of war has stated that the "unchallenged principle" of humanity "is embodied in the rule that noncombatants, whether in occupied territory or elsewhere, must not be made the object of attack unrelated to military operations and directed exclusively against them."¹⁰⁶ This of course does not solve the problem of whether or not the belligerent must refrain from attacking a legitimate object because of the immediate presence of large numbers of civilians. Certainly, as set forth in Article 28 of the Civilians Convention of 1949, the presence of protected persons may not be used to render a point immune from military operations. Thus the defenders cannot herd large groups of civilians into areas which are legitimate objects of attack in order to attempt to defend them in such a manner.¹⁰⁷

The destruction inflicted by armed attack must, as in the case of all destruction of values in time of war, have a military relevance and must have a "reasonably close connection"¹⁰⁸ with a legitimate objective. Thus the Hague Regulations of both 1899 and 1907, permitted bombardment only on "defended places" and prohibited the bombardment of those areas which were "undefended".¹⁰⁹

The Korean Conflict did alter the international law with respect to the exemption of small coastal fishing craft operated by civilians as being legitimate objects of attack. In THE PAQUETE HABANA¹¹⁰ the United States Supreme Court reiterated the rule of international law that small coastal

fishing vessels could engage in their local fishing activities without being subject to capture. During the Korean Conflict the United States blockading forces made no exception for the usually exempt fishing craft and all were seized and destroyed.¹¹¹ The purpose of those actions was to cut off a main food source for the North Korean and Chinese Communist troops as fish was a staple in the diets of both armies, but the effect was to expand the concept of what constituted legitimate objects of attack in a time when the humanitarian concerns of the world were attempting to limit these objects.

IV

THE CONTEMPORARY CONCEPT OF PROTECTION AS VIEWED
BY THE UNITED NATIONS AND THE INTERNATIONAL
COMMITTEE OF THE RED CROSS

The 1949 Civilian Convention was a step in the right direction. It was the first attempt to provide specific protection to the noncombatants. It was not the mere redefining of existing rules but was a new and distinct approach - "a completely new and separate"¹¹² treaty. A treaty which was to contain "its own rules of application."¹¹³ This convention attempted to draw up detailed rules covering "all possible eventualities".¹¹⁴ The convention as stated in Article 154 was in "Supplement to sections II and III" of the Hague Regulations. Notwithstanding its expressed objectives and its new approach the convention has fallen short of meeting the contemporary need for positive protection of the civilian population. The convention provides only minimum protection based upon general humanitarian principles for the civilian population involved in armed conflict "not of an international nature."¹¹⁵ The convention does not provide for mandatory protection in many needed areas such as hospital safety zones, zones of safety and zones of immunity. Emphasis within the convention is on the protection of civilians after occupation, and of the protection of internees.¹¹⁶ The

protection of the civilian population from the dangers incidental to an armed attack on the territory in which they reside is not adequately dealt with. Realizing the inherent weaknesses of this convention efforts within the world community have been initiated to bring the convention more into line with the realities of modern armed conflict.

A. The Approach of the United Nations

Since the cease fire ending the June 1967 "Six Day War" in the Middle East, the United Nations has intensified its effort to enhance respect for human rights in armed conflicts especially those as relate to the rights of the civilian population. In a resolution passed a week after the termination of hostilities between the Arabs and the Israeli forces the Security Council stated:

Considering the urgent need to spare the civil population . . . of additional sufferings,

Considering that essential and inalienable human rights should be respected even during the vicissitudes of war,

Calls upon the government of Israel to ensure the safety, welfare and security of the inhabitants of the area when military operations have taken place . . .

Recommends to the governments concerned the scrupulous respect of the humanitarian principles governing . . . the protection of civilian persons in time of war, contained in the Geneva Conventions of 12 August 1949;¹¹⁷

The following year the International Conference on Human Rights was convened at Teheran. This Conference, held during the International Year for Human Rights, in its final act, passed a resolution on human rights in armed conflicts.¹¹⁸ The resolution stated that:

Considering . . . that the Red Cross Geneva Conventions of 1949, are not sufficiently broad in scope to cover all armed conflicts,

Noting that states parties to the Red Cross Geneva Conventions sometimes fail to appreciate their responsibility to take steps to insure the respect of these rules in all circumstances . . .

called upon the Secretary General of the United Nations to study:

- (a) Steps which could be taken to secure the better application of existing humanitarian international conventions and rules in all armed conflicts;
- (b) The need for additional international conventions or the possible revision of existing conventions to insure the better protection of civilians . . .

In the following session of the United Nations,¹¹⁹ that organization adopted inter alia a resolution which dealt with the subject of the "Respect for Human Rights in Armed Conflicts." This resolution 2444 (XXIII) took note of the "Teheran Proclamation" and affirmed the need to implement the provisions of that resolution as soon as possible.¹²⁰ The resolution further formally called upon the Secretary General in consultation with the International Committee of

the Red Cross to study those areas which had been proposed for study in the "Teheran Proclamation."¹²¹ The Secretary General was further directed to report the steps that he had taken at the following session of the General Assembly.

The next year the Secretary General submitted his report.¹²² This preliminary report was adopted by the General Assembly on 16 December, 1969, in a resolution in which the Assembly, among other things, requested the Secretary General to continue his study initiated under the authority of Resolution A/2444 (XXIII) with special attention being given to the necessity of protecting civilians especially in armed conflicts which arose from peoples struggles to free themselves from colonial and foreign rule.¹²³

In September 1970, the Secretary General submitted his second report.¹²⁴ This report dealt extensively with the question of civilians and the need for their adequate protection. The report suggested the formulation of detailed minimum standards which would amplify the three basic principles set forth in General Assembly Resolution A/2444 (XXIII).¹²⁵ The Secretary General recommended that the rules apply to any situation which was an armed conflict "without further qualification"¹²⁶ The rules were to establish standards in the following areas:

- (1) Prohibition of direct attacks
- (2) Prohibition of attacks on civilian refugees, safety zones and sanctuaries
- (3) Prohibition of use of civilians as objects of reprisals

- (4) Prohibition of use of civilians to shield military operations
- (5) Placing of obligations on attacking commanders to insure objects of attack were not for exclusive civilian use
- (6) Obligation on parties to insure minimum loss to civilians in vicinity of an attack
- (7) Obligation of parties to remove civilians from vicinity of an area likely to be attacked
- (8) To endeavor to keep large armed forces from being situated in heavily populated areas
- (9) The entitlement of civilians to receive international assistance.¹²⁷

The report of the Secretary General took a favorable view of the need to establish, on a larger scale than provided for under the 1949 Geneva Conventions, a system of refuges and sanctuaries drawing attention to the successful agreement for the protection of cultural property negotiated at the Hague in 1954.¹²⁸ The object of such new regulations was to do away with the inadequacies of the 1949 Geneva Conventions which did not establish any obligation on the part of any of the contracting parties to establish such zones although they are generally provided for in the Conventions.¹²⁹ Such refuges and sanctuaries as proposed by the Secretary General would have to meet strict conditions concerning their selection, designation and location.¹³⁰ It would provide for a system of registration of such areas similar to that set forth in the 1954 convention on cultural property.¹³¹

The second report of the Secretary General also set forth rules and suggestions for the protection of persons in internal armed conflicts. The report suggested the expansion of the common Article 3 of the 1949 Geneva Conventions by adding the following classifications of persons to those already set forth in Article 3.

- (1) Those whose conduct and activities have no relation what so ever to the conduct of hostilities.
- (2) Those who participate or assist whenever such participation or assistance is under duress. .
- (3) Those who merely express opinions criticizing the government or favoring the uprising.¹³²

The twenty fifth session of the United Nations considered the Secretary General's two reports and adopted a series of resolutions dealing with the area of respect for human rights in armed conflicts. In Resolution A/2671 (XXV)¹³³ the General Assembly condemned the actions of countries which, in violation of the Charter of the United Nations, continued to conduct wars of aggression and defied the principles of the Geneva Protocol of 1925¹³⁴ and the Geneva Conventions of 1949. The resolution further considered that these conventions and protocol should be strictly observed and that those states which acted in violation of them should be condemned and held responsible to the world community.

In Resolution A/2675 (XXV)¹³⁵ the General Assembly, in noting that the international community has accepted an increased role and new responsibilities for the alleviation of human suffering especially during armed conflicts and

recalling the importance of the strict observance of the 1949 Geneva Conventions, affirmed certain basic principles for the protection of the civilian population in armed conflicts, to wit:

- (1) Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.
- (2) In the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations.
- (3) In the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations.
- (4) Civilian populations should not be the object of military operations.
- (5) Places and areas designed for the sole protection of civilians, such as hospital zones or similar refuges should not be the object of military operations.

In its final resolution on the subject of the "Respect for Human Rights in Armed Conflicts"¹³⁶ the General Assembly noted the continuing value of the existence of humanitarian rules covering armed conflicts and in particular the 1899 and 1907 Hague Conventions and the 1949 Geneva Conventions but

that such rules did not meet the needs of contemporary conflicts. The assembly re-affirmed the principles set forth at the Teheran Conference and in its own Resolution A/2444 (XXIII) and called upon all nations to observe the Hague and Geneva Conventions, further calling upon the Secretary General to solicit comments on his second report and to report the results of these comments and the development coming out of the 1971 International Committee of the Red Cross Convention which was scheduled for 24 May to 12 June 1971 in Geneva.

The third report of the Secretary General¹³⁷ set forth a summarization of the work of the 1971 International Committee of the Red Cross Conference of Governmental Experts held in Geneva.

B. The International Committee of the Red Cross' Approach

1. 1971 Proposals

In September 1969 the XXIst International Conference of the Red Cross, held in Istanbul, unanimously adopted a resolution, entitled "Re-affirmation and Development of the Laws and Customs Applicable in Armed Conflicts,"¹³⁸ which requested the International Committee of the Red Cross to actively pursue its efforts with respect to the formulation of concrete rules to supplement those humanitarian rules currently in effect. On the basis of this resolution the International Committee of the Red Cross organized a Conference of Government Experts which was to meet in Geneva from 24 May to 12 June 1971. Invitations were sent to thirty

nine nations and the Secretary General of the United Nations to attend this conference.¹³⁹ During the opening session it was decided that the experts attending the conference would express personal opinions not binding upon the governments which appointed them and that the conference would reach no decisions and pass no resolutions.¹⁴⁰ The considerations of the Conference were based primarily upon eight documents which had been previously prepared by the International Committee of the Red Cross.¹⁴¹ The agenda of the Conference was to consider the following:

- (a) Protection of the wounded and sick
- (b) Protection of victims of non-international armed conflicts
- (c) Rules applicable in guerrilla warfare
- (d) Protection of the civilian population against dangers of hostilities
- (e) Rules relative to behavior of combatants
- (f) Measures intended to reinforce the implementation of the existing laws.¹⁴²

The items on the agenda were allocated among four committees. Committee III considered the question of the protection of the civilian population, a question which in previous years had met with less than an enthusiastic reception. As stated by Mr. M. A. Naville, President of the International Committee of the Red Cross and Chairman of the Conference, in his opening remarks:

The work carried on in 1956 and 1957 led to the submission to the XIXth International Conference of the Red Cross of draft rules for the limitation of the

dangers incurred by the Civilian Population in time of war. The draft met with a cool reception from governments.

However, since that time world opinion and governments' attitudes have undergone certain changes . . .¹⁴³

At the first plenary session, the governmental experts, on the whole, considered that care should be taken not to raise the question of the complete revision of the 1949 Geneva Conventions because it was felt that they would be weakened by such considerations. Rather, it was decided that it would be better to reaffirm these conventions because they constituted the basis of all future developments.¹⁴⁴ It would be necessary therefore to draft new texts in those areas where the present conventions had proven to be inadequate by reason of the new humanitarian concerns of the world community. The approaches of the experts to the new challenges were varied. Some experts advocated the maintaining and consolidating of international peace in accordance with the principles of the Charter of the United Nations.¹⁴⁵ Others were of the opinion that it was indeed sad, in view of Article 2 (4) of the Charter, that there had to be studies of the law of armed conflict and that a review of the efforts had not eliminated war but only limited its evils.¹⁴⁶ Some experts felt that the humanitarian aims should be towards the suppression of weapons¹⁴⁷ while others felt that peace could only be achieved through bi and multi lateral agreements.¹⁴⁸ A split in opinion was also evident on whether or not the distinction should be maintained as between Articles 2 and 3 of the present Geneva Conventions.¹⁴⁹

Turning to the consideration of Document III concerning the protection of the civilian population the final report of the International Committee of the Red Cross stated that the "results were encouraging".¹⁵⁰ What did this document recommend¹⁵¹ and what was the approach of the International Committee of the Red Cross? In the introduction to Document III it is stated that:

(t)he Red Cross, born on the battlefield, was mainly concerned, at the start of its history, with caring for the sick and wounded because at that time, the civilian population was not subjected to the suffering that it has known in modern armed conflicts. Nevertheless, following a development due mainly to improved artillery and aviation, particularly during the first World War, situations in which civilians found themselves equally exposed to dangers, if not more so, than combatants, became more and more frequent. While still registering its opposition to the very nature of war, the Red Cross was called upon to work on behalf of fresh victims.¹⁵²

The slant of this third Document was toward the development of basic rules to be inserted into a protocol¹⁵³ and the idea that the protection due to the civilian population against the dangers of military operations should be the same in all situations and in all types of armed conflicts.¹⁵⁴

Thus as far as the Red Cross was concerned it was:

Mainly the notion of civilian population and non-military objects which must be seek (sic) in order to attempt to establish a few basic rules of protection for the benefit of the civilian population. This will also lead to an examination of the notion of military objectives, on the subject of which it is noted that there is an absence of precision and unanimity liable to bring about, in practice, serious abuses from which the civilian population suffers.¹⁵⁵

The International Committee of the Red Cross' approach consisted, mainly, of defining illicit objectives.¹⁵⁶ To this

end the Red Cross put forward certain concrete proposals and set out other norms of international law. They set forth specifically that:

In the conduct of military operations, a distinction must be made at all times between, on the one hand, persons who directly participate in military operations and, on the other hand, persons who belong to the civilian population.¹⁵⁷

The norms of international law established no absolute immunity for civilians against attack.¹⁵⁸ These norms do forbid the mounting of a direct attack against civilians¹⁵⁹ and forbid authorities from exposing civilians to direct attack.¹⁶⁰ On the basis of these norms the Red Cross proposed that:

The civilian population shall enjoy general protection against dangers arising from military operations. The civilian population should not, in particular, be the object of attack . . . Nevertheless, civilians whose activities directly contribute to the military effort, assume, within the strict limits of these activities and when they are within a military objective, the risk resulting from direct attack against that objective.¹⁶¹

The International Committee of the Red Cross did endorse certain areas of special protection in the case of women, children, wounded, sick and infirm, journalists and police and firemen. The Red Cross did not propose any drafts on the question of populated areas under special protection such as refuges and sanctuaries.¹⁶² Specific ideas were set forth in other areas. The Secretary General had suggested in his second report that minimum guarantees would apply in any armed conflict without any further qualification and further that such minimum guarantees would apply whether or not the conflict was of an international or national character and to all acts

of violence committed against an adverse party by force of arms whether in defense or in offense.¹⁶³ The International Committee of the Red Cross similarly suggested in their proposals that the basic rules to be included in a protocol should apply in all types of armed conflicts.¹⁶⁴

As previously noted, General Assembly Resolution 2444 (XXIII) provided that at all times the distinction between persons taking part in the hostilities and the civilian population must be maintained so that the members of the civilian population will be spared as much as possible from the sufferings of the hostilities. This was further amplified in the basic principles set forth in General Assembly Resolution 2675 (XXV) wherein it was stated that in the conduct of military operations during an armed conflict a distinction must be made between persons actively taking part in the hostilities and the civilian population and, further, that every effort should be made to spare the civilian population from the ravages of war. Civilians should not be made the objects of military operations. This theme was reaffirmed by the International Committee of the Red Cross in their proposals set out in Document III. These proposals stated that:

- (a) the obligation to make, at all times, a distinction between persons directly participating in military operations and persons belonging to the civilian population,
- (b) the obligation to spare the civilian population as much as possible,
- (c) the obligation to restrict in all circumstances,

attacks to military objects alone.¹⁶⁵

Much effort has been expended by all participants in attempting to define the civilian population. The Secretary General realized that a "general understanding of the term "civilians" or "civilian population" for the purpose of the applicability of the proposed standard minimum rules "would have to be achieved in order to insure the identity of the beneficiaries of any changes.¹⁶⁶ The Secretary General's approach was a somewhat negative definition. Those not taking part in the hostilities would be considered civilians,¹⁶⁷ the following would not be classified as civilians:

- (a) members of the armed forces or of their auxiliaries or complementary organizations
- (b) persons not belonging to the forces referred to above but nevertheless taking part in the fighting or contributing directly to the conduct of military operations.¹⁶⁸

Any person not falling within the categories set out would be considered to be a valid civilian and subject to protection from attack.

The International Committee of the Red Cross approached the matter in a similar manner. They proposed two draft definitions. In the first, civilians were defined as those individuals who did not form a part of the armed forces or who did not directly participate in military operations. It was further stated in this first draft that individuals whose efforts contributed directly to the military effort did not, for that reason alone, lose their status as civilians. The

second proposed draft of the Red Cross would have eliminated this caveat.¹⁶⁹

The Secretary General had dealt with precautionary measures which were necessary for the protection of the civilian populations. The need for such warnings had previously been acknowledged by the world community and has become one of the few mandatory obligations which has been passed from one convention to another.¹⁷⁰ The Secretary General referred to the obligation of the authority ordering an attack to insure that the object of such an attack was not the civilian population nor those dwellings nor means of transportation established for their exclusive use.¹⁷¹ The approach of the International Committee of the Red Cross was to propose "active" and "passive" precautionary obligations.¹⁷² Active precautions would place the obligation on the authority which ordered an attack to insure that all necessary steps were taken to spare the civilian population and those non-military objects designed for their use.¹⁷³ To this end the proposals set forth a statement that members of the civilian population should benefit from the presumption that they do in fact belong to the civilian population and that non-military objects should benefit from the presumption that they have in fact no military nature.¹⁷⁴ Passive precautionary measures place obligations on both sides to take measures to protect the civilian population. These measures would include a general obligation to take all necessary steps to protect the population and objects from dangers of military operations and to remove military objectives from threatened areas or avoid

the permanent presence of such objects in densely populated areas.¹⁷⁵

As in any conference of this nature the proposals initially put forth, in this case by the eight working documents drafted by the International Committee of the Red Cross, were only the starting point. Various draft formulations were presented by the some 200 experts in attendance. As previously stated, the conferees in their basic rules had decided that the Conference would pass no resolutions nor make any decisions,¹⁷⁶ that the experts would express only their opinions which would not be binding upon their respective governments, although the opinions certainly reflected the instructions which they had received and thus in reality were the opinions of government. This conference in 1971 was a collecting house for ideas. As such it was successful in bringing the many and varied opinions of the world community to a central location from which they could be evaluated, modified and hopefully codified into a significant new agreement which would extend much needed protection to those individuals who under existing international law were unprotected or inadequately protected. It was not possible for this Conference to fully deal with all the items on the agenda and therefore it was desirable that an additional conference be convened. On 27 September 1971 the International Committee of the Red Cross sent invitations to all states which were parties to the 1949 Geneva Convention and to the Secretary General of the United Nations to delegate experts to attend a Conference to be held at Geneva on 3 May to 3 June 1972.¹⁷⁷

2. 1972 Proposals

At the close of the 1971 Conference the delegates had before them extensive documentation both as initially presented by the International Committee of the Red Cross and as submitted by the various governmental experts. With all this material before the conference it was felt that a new start was needed. The Conference then recommended that the International Committee of the Red Cross endeavor to prepare complete and specific new drafts.¹⁷⁸ With this mandate the President of the Red Cross stated at the final meeting of the 1971 session:

The ICRC will endeavor to draw up for the next session a series of draft protocols, bearing in mind as far as possible the various opinions expressed here but without necessarily proposing compromise solutions or seeking systematically a kind of common denominator easily acceptable to all parties. Each article will be accompanied by a brief comment, but the eight fascicles which you have received will still be the basic documentary material as well as, of course, the report of the present conference.¹⁷⁹

In preparation for the drafting of new regulations and in accordance with the desires of the 1971 conferees the International Committee of the Red Cross sent a questionnaire to all states party to the 1949 Geneva Conventions so that they could make known their feelings concerning certain measures designed to reinforce the present Conventions.¹⁸⁰ Prior to the convening of the second conference the International Committee of the Red Cross submitted to the various governments their draft texts which were to be the basis for discussion at the forthcoming conference. There were two draft texts or protocols presented. The first draft was

applicable to armed conflicts of an international nature,¹⁸¹ and the second draft was applicable to armed conflicts not of an international nature.¹⁸²

In 1972 the International Committee was thus changing its approach. At the first Conference the International Committee and many of the expert attendees had envisaged the drafting of a series of distinct agreements relating to the areas of concern, specifically the protection of wounded, sick and shipwrecked persons, of the civilian population and of combatants.¹⁸³ At the time of the drafting of the new proposed protocols, the International Committee of the Red Cross thought that it would be advisable to submit one draft which would modify all four of the 1949 Geneva Conventions. The reasoning behind this decision was three fold:

- (1) The concern for maintaining the unity of international humanitarian law, the Geneva conventions having always been considered as forming a whole.
- (2) The advantage of having a single protocol.
- (3) The desire to avoid the complex treaty relations between the states concerned which might result from the existence of a series of distinct legal instruments.¹⁸⁴

The first draft protocol, dealing with armed conflicts of an international nature, was divided into six parts.¹⁸⁵ The draft was to be applicable in all situations provided for in common Article 2, of the 1949 Geneva Conventions. The new convention was to apply in the case of "declared war or any other armed conflict which may arise between two or more of the

High Contracting Parties even if a state of war is not recognized by one of them"¹⁸⁶ and in "all cases of partial or total occupation of the territory of a High Contracting Party even if said occupation meets with no resistance."¹⁸⁷

Article 6 of the draft was designed to strengthen the protecting power concept. The draft article states:

Article 6 - Appointment of Protecting Powers and
Their Substitute

1. For the sole purpose of applying the conventions and the present protocol, each of the parties to the conflict has the obligation to appoint a protecting power from the beginning of the hostilities, and must accept the activities on its territory of a Protecting Power appointed by the adverse party. If, despite the foregoing, the appointment of a Protecting Power is not made, the parties to the conflict shall accept, as substitute, the International Committee of the Red Cross or any other impartial humanitarian organization.

The present language of Article 10 of the first three Geneva Conventions concerning Protecting Powers is permissive. The language of Article 9 of the fourth convention, while being mandatory, provides no sanction if a party does not seek the appointment of a protecting power and provides only a moral obligation to accept an appointee.¹⁸⁸ Thus the language of the draft Article 6 states that there is an "obligation to appoint" a Protecting Power. Failing in this obligation, if an appointment is not made, the parties to the conflict "shall accept", as a substitute Protecting Power, the appointment of

the ICRC or any other impartial humanitarian organization. The drafter further contemplated the establishment of a permanent body to serve in this capacity as a substitute Protecting Power but no specific draft was presented.¹⁸⁹

Part IV of the draft Protocol deals with the civilian population. Its purpose was the reaffirmation and development of the existing law. The Fourth Convention of the 1949 Geneva Convention was concerned principally with the protection of those civilians who were in the hands of the enemy,¹⁹⁰ although Part II of that Convention had broader application and was directed toward the civilian population as a whole. Notwithstanding the attempt of the 1949 Convention, these protections fell short of that which is needed in light of the realities of modern warfare. The proposed draft was designed to supplement the meagre provisions of Part II of the Civilian Convention of 1949.

Section I of Part IV of the draft protocol contains the general provisions, the definitions of the objects of protection. This draft basically accepts the negative definition of the Secretary General of the United Nations and that of the 1971 Conference. That is, the civilian population is defined as "Any Person who is not a member of the armed forces and who, moreover, does not take a direct part in hostilities . . ."¹⁹¹ Section II of the draft, "Protection of the Civilian Population Against Dangers Resulting From Hostilities" deals with a field which had previously been covered "by customary law and barely touched upon by the Fourth Convention".¹⁹² Utilizing the 1907 Hague Convention,

the Civilian Convention of the 1949 Geneva Conventions and various United Nations Resolutions as its basis¹⁹³ the draft protocol has set forth in Article 45 five specific protections designed to insure respect for the civilian population. These specific protections are:

- (1) The civilian population as such, as well as individual civilians shall never be made the object of attack.
- (2) In particular terrorization attacks shall be prohibited.
- (3) Attacks which, by their nature, are launched against civilians and military objectives indiscriminately, shall be prohibited.
- (4) Attacks directed against the civilian population or individual civilians by way of reprisals shall be prohibited.
- (5) Nevertheless civilians who are within a military objective run the risks consequent upon any attack launched against this objective.

The draft protocol distinguishes between objects which are of a general civilian character and those which are indispensable to the survival of the civilian population. The draft prohibits attacks against objects of a civilian character providing such objects are not used for a military purpose.¹⁹⁴ Whereas in the case of objects which are indispensable to the survival of the civilian population the draft confers a more specific scope of protection. Article 43 specifies that attacks against such objects "by way of

reprisals is prohibited". This specific provision, when tied to the definition of civilian objects set forth in Article 42 which states that "crops, provisions and other foodstuffs, drinking water, reserve supplies . . . shall be presumed to be objects of a civilian character", could be utilized as an effective means for preventing the use of famine as a military weapon.

The problem of "precautionary measures" is also dealt with in the draft protocol. As was previously noted, the 1971 approach of the International Committee of the Red Cross divided this area into active precautions or those measures which dealt with the obligations of the attackers and passive measures or those obligations on the authorities in whose control the civilian population was placed.¹⁹⁵ The present protocol has changed this approach. The precautionary measures are not designed to eliminate the risks of direct attack but rather the "secondary effects"¹⁹⁶ of an attack. Article 49 places certain obligations on the attacking force when planning and carrying out operations when there are members of the civilian population or civilian objects in the area of operation. The attacker shall insure that the objects being attacked are neither "civilian nor objects of a civilian character" and if the objects cannot be identified as legitimate military objects the attacking force "shall refrain from launching the attack." The attacking authorities shall warn "when ever circumstances permit" the advanced warning, take or seek shelter.

The question of proportionality is also affirmatively

dealt with in these proposals. Proportionality, under various names, has been embedded in the laws of war.¹⁹⁷ Here the drafters have spelled out the obligations of the attacking authorities in a positive way

Those who order or launch an attack, shall refrain from doing so when the probable losses or destruction are disproportional to the concrete military advantage sought by them.¹⁹⁸

Parties to the conflict are also proscribed from attacking "as one sole objective" an area which comprises more than one military objective all of which is situated in a populated area. Additionally, Article 50 mandates the choice of military objectives, where any one of several will obtain the "same military advantage", to those which will present the least danger to the civilian population. An obligation is also placed upon the authorities which have a civilian population under their control to take necessary precautions "against the dangers of attack", to remove them from the "vicinity of threatened military objectives" and to insure that military objectives are not "permanently situated within densely populated regions."¹⁹⁹

The new proposals of the Red Cross also deal extensively with the establishment of localities which would be under special protection. This was not an attempt to expand the protection presently in effect. Article 23 of the First Geneva Convention of 1949 and Article 14 of the Fourth Convention provide, by the establishment of hospital zones, special protection for the limited number of beneficiaries who happen to be in the zone. However, to receive effective protection,

the remainder of the population must be transported to the area of protection. The proposed protocol provides for the establishment of "nondefended localities" and "neutralized localities". Such areas are populated sites and "for this reason the more precise term 'locality' rather than that of 'zone'"²⁰⁰ was utilized. The protection is given not to certain individuals because they happen to be located within an area but to the locality itself and the civilians within the area would collaterally receive the protection. Article 53 of the proposed protocol specifically provides that it is "prohibited to attack, by any means whatsoever, populated sites upon which the parties to the conflict have conferred, by agreement, the status of nondefended localities". Such nondefended localities are sites located within a zone of military operations.²⁰¹ Areas located outside a zone of military operation are referred to as "neutralized localities"²⁰² and similar agreement provisions are offered for use in their case. Additional provisions are provided for certain works and installations which contain dangerous forces such as dikes, hydroelectric dams and sources of power which could present special dangers to the "civilian population" or "objects of a civilian character" through the "release of natural forces."²⁰³ Here the contracting parties are invited, in time of peace or in time of armed conflict, to agree upon procedures for the protection of such works or installations.

The entire character of this chapter of the protocol is weak in that the measures, which in and of themselves are sufficient, are not given the positive and mandatory approach

which is needed to insure their successful application. Inviting parties to agree only postpones the essential character of the protection. Providing for the establishment of localities "by agreement" after the outbreak of hostilities gives little chance that such areas will in fact be established.

The remainder of part IV of the first draft protocol deals with special protection for children, an area previously stressed in numerous provisions of the Civilians Convention of 1949.²⁰⁴ Part IV then sets out a general protection for the entire population with the inclusion of a specific article on the question of supplies and relief for the civilian population. This was an area of needed revision because of its unequal application on the present Civilian Convention. For example, Article 23 of the Civilian Convention allows the free passage of medical supplies for the civilian population but only allows the free passage of foodstuffs for children under fifteen and expectant mothers. The proposed protocol would remedy this situation by insuring the supply of goods indispensable to the entire civilian population.²⁰⁵

The second draft protocol presented by the International Committee of the Red Cross

Which elaborates and supplements Article 3 common to all four Geneva Conventions of August 12, 1949 (hereinafter referred to as Common Article 3), shall apply to all conflicts not of an international character referred to in common Article 3.²⁰⁶

The purpose of this draft, as stated in the preamblytory paragraph, is to insure "the basic humanitarian protection of all persons, whether combatant or noncombatant."

The second chapter of this second draft protocol was

designed to provide general protection for the entire population. Instead of beginning with a general principle enunciating the need for unconditional respect for the human rights of all individuals, the experiences of the past wars had shown the need to expressly prohibit certain cruel acts. Therefore, the draft Articles 4, 5, and 6 attempt to enhance the general principles of humanitarianism by specifically prohibiting terrorism, reprisals, pillage, rape and indecent assault - acts which had not previously been proscribed in the common Article 3, although it can be contended that they were implied.

The common Article 3 provided only that the sick and the wounded will be "collected and cared for." The draft protocol sets forth more elaborate protections in line with those which provided for the sick and wounded in international armed conflicts. The draft provides in Article 7 that

All wounded, sick and shipwrecked persons, military and civilian, as well as infirm persons, expectant mothers and maternity cases, shall be the object of special protection and respect.

In view of the nature of noninternational armed conflicts a reciprocal obligation is placed upon the civilian population itself to refrain from committing acts of violence against the sick, wounded and shipwrecked. This obligation is a carry-over from the provisions contained in Article 18 of the First Geneva Convention of 1949 and is made to apply, through the new draft, to those conflicts not of an international nature.

Chapter IV of the second draft protocol deals specifically with the protection of the civilian population. It is stated

that it is concerned

with a sphere so far governed by customary law and hardly touched by the Fourth Convention relative to armed conflicts of an international character: the limitation of dangers resulting from hostilities.²⁰⁷

The risks faced by the civilian population in the non-international conflict are two-fold, paralleling risks faced by the civilian population in the international conflict, as dealt with in the first draft protocol. They are the risks from direct attack against them and the risk of secondary effects from attacks launched against legitimate military objectives.²⁰⁸ To begin, Article 14 of the second draft protocol defines the civilian population in the same negative terms which have been used throughout.²⁰⁹ The draft supplements this definition, in view of the nature of the conflicts being considered, with two alternative but similar proposals which in effect state that the presence within the civilian population of members who do not conform with the definition²¹⁰ or who are individual combatants²¹¹ "does not prevent the civilian population from being considered as such."

Article 15 would provide for the civilian population in the armed conflict not of an international character the same protections that had been set forth in the Hague and Geneva Conventions and annunciated in various United Nations Resolutions²¹² to wit:

- (1) That the civilian population and individual civilians shall never be made the object of attack
- (2) That terrorist attacks are prohibited
- (3) That attacks launched indiscriminately against

civilians and military objectives are prohibited

(4) That the civilian population shall never be used to shield military objects from attack.

The draft, in Article 17, also sets forth precautionary measures which are designed to protect the civilian population from the dangers of the secondary effects of attack. These precautionary measures are similar in scope to those previously discussed in connection with the First Draft Protocol.²¹³

Increased emphasis is also placed in this draft on the means for insuring the passage of relief materials to the populations of areas engaged in non-international armed conflicts. Article 29 provides that the parties to such a conflict shall insure the supply of indispensable food stuffs, clothing, medical and hospital stores to the populations of the territory under their control. It should be noted that the term "population" is utilized. This term is "not confined to the civilian population but includes combatants and civilians interned or sentenced for acts committed in connection with the armed conflict."²¹⁴ The draft in Article 31 provides that "in the case of blockade or seige the Parties . . . shall allow the free passage of all consignments of essential foodstuffs, clothing, medical and hospital stores . . . intended for civilians." Blockade is an effective weapon in the limited scope of the internal war.²¹⁵ However, such action can be said to "deliberately inflict on the group conditions of life calculated to bring about its physical destruction in whole or in part."²¹⁶ As such a blockade would be in violation of International Law. Article 31, with

its principle of free passage seeks to insure, because of humanitarian considerations, that a blockade cannot cause the destruction of values which the Genocide Convention has sought to preserve.

V

FINDING ADEQUATE PROTECTIONS FOR THE CIVILIAN VICTIMS OF ARMED CONFLICTS

A. The Validity of the Present Conventions

The question readily presents itself, is the present international law, both customary and treaty sufficient to provide adequate protection to the civilian population? If it is, one could stop at that point. Clearly the existing law has proven to be inadequate. Four out of five victims in the Korean conflict were civilians and as impossible as it may seem the toll of civilian suffering in Viet Nam may be even greater.²¹⁷ As stated by Captain Nurick, Judge Advocate General's Corps, United Stated Army at the close of the Second World War

How . . . is the noncombatant immune from attack? He is legally subject to almost unrestricted artillery and naval bombardment. If he lives in a besieged locality he may legally be starved or bombed. If he lives in a country which does not grow enough food to support its population, a blockade can legally starve him to death. If he lives in an important city, he is subject to bomb and robot attack of the most catastrophic nature. True, in many cases he may not be the intended subject of attack, but under modern methods of waging war that gives him little protection. Where does this leave the "fundamental" doctrine that a noncombatant is relatively immune from attack? In many cases there still is a distinction. To take an extreme case there is no doubt that if an aviator strafed children in a kindergarten he would be guilty of a war crime. On the other hand the bombing of a neighboring large munitions factory is unquestionably

legal. Where is the line between them?²¹⁸

That line cannot be established with definitions. While it is necessary to define the objects of protection the real question is in defining the protection to be given. The problems hinted at by Captain Nurick were present in 1949 but were not met head on by the drafters of the convention. The general protection of the civilian population was dealt with in only fourteen of the 159 articles contained in the Fourth Convention²¹⁹ and even here the emphasis was on the protection of the sick, wounded and hospitalized personnel. This of course places the cart before the horse. In contemporary armed conflicts the only adequate means of providing protection to the noncombatant civilian population is to provide protection which will keep them from becoming victims of war. To be effective, the protection to be provided must be more than a declaration of human rights. The protection must be, in the words of Professor Lauterpacht "an instrument laying down legal rights and obligations as distinguished from a mere pronouncement of moral principles and ideal standards of conduct."²²⁰

Professor Falk states:

The evidence suggests that the current condition of the laws of warfare is inadequate for several principle reasons:

First, the rules were evolved long ago under circumstances that seem remote from the nature of modern warfare;

Second, such remoteness in time and tactics tend to obscure the persisting relevance of the underlying policies - the prohibition of cruel and unnecessary suffering not clearly related to the legitimate pursuit of belligerent objectives.²²¹

Certainly one must establish sound underlying principles

in order to develop positive rights and obligations. The most effective principle for the protection of civilian victims of war is set forth in the Charter of the United Nations.

All members shall refrain . . . from the threat of force . . .²²²

Strict adherence to this mandate would not only effectively promote the basic purpose of the United Nations, the maintenance of international peace and security, but would eliminate the need for rules designed for the protection of the victims of warfare. But such an approach is not real. It does not take into consideration that the Charter acknowledges the right of nations to engage in war²²³ and further that conflicts within the bounds of a single state may not be within the jurisdiction of the United Nations under its present Charter.²²⁴

Because the 1949 Geneva Convention for the Protection of Civilian Persons in Time of War does not go far enough in providing adequate protection to the noncombatants does not in and of itself mean that the Convention should be set aside and a new attempt made to establish adequate protection. Just the opposite should take place. The 1949 Geneva Convention should be preserved as the first step from which expansion of this needed protection can be launched. We are today in an age very much attuned to humanitarian considerations. Similar considerations, etched in the minds of the world community by the events of World War II, enabled agreement to be reached on the formulation of the protections set forth in the Fourth Convention. The recent efforts of the International Committee of the Red Cross in the two draft protocols presented to the

1972 Conference of Governmental Experts were attempts to build up the foundation of the existing conventions.

B. The Validity of the Concept of Sanctuaries and Refuges

The present Civilians Convention considers the problem of the establishment of special zones within which extraordinary protection will be granted. Article 14 of this convention states "in time of peace . . . or after the outbreak of hostilities" the parties "may" establish in their or in occupied territory certain hospital zones and safety zones. It is further provided that after the outbreak of hostilities the parties "may conclude agreements on mutual recognition of the zones and localities they have created."²²⁵ In a similar manner the Convention provides for the proposing of the establishment of neutralized zones.²²⁶ All the provisions are permissive and require negotiations between the belligerent parties to an international conflict. They are, additionally, not even applicable in the noninternational conflict. Since they require such negotiations during the course of a conflict, even with the efforts of impartial humanitarian organizations, their chances of being meaningfully applied are greatly reduced.

The concept of the establishment of sanctuaries is a viable one. The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954²²⁷ indicates that the establishment of sanctuaries and refuges, in this limited area, is a concept that is acceptable to members of the world community. Such positive arrangements

should be investigated for the use of the civilian population. This would be one method for increasing the protection to be granted to noncombatants by gathering them into a place where they could be insured adequate, special, protection. The present system which does not impose an obligation upon the belligerent participants to establish such sanctuaries and refuges and which imposes no obligation on the part of the other belligerent to recognize them, even if such sanctuaries and refuges are in fact established, in effect provides no system at all. A mandatory system is necessary.

The establishment of sanctuaries, under a mandatory system, would have to meet strict controls in order that they might receive community approval. First, there would have to be designated an appropriate agency which would handle the registration of such area as sanctuaries. This agency would have to set forth firm guidelines which would regulate the selection, location and physical capability of each designated area. These regulations would have to include insurances that the areas designated would not receive any military benefit which could favor one of the parties to the conflict. They would, naturally, have to be completely neutralized areas and should not contain large industrial complexes which would benefit any war effort.

Within such designated areas the movements and activities of the individuals resident therein would have to be restricted. It would have to be provided that access to such areas would be limited to the classes of persons for which the protection was designed, to wit: the noncombatant civilian population.

Free ingress and egress of the protected persons would likewise have to be restricted. It could not be allowed to have persons passing from the specially protected areas to engage in activities which directly relate to the military effort and then freely return to the protection of the locality. Activities within the localities would similarly be restricted to those essential for the well-being of the noncombatant population of the area.

The establishment of such areas should be authorized in time of peace as well as in time of actual armed conflicts. A state or a party to a conflict would make application to the impartial agency designated for the control of such localities. Such an application would set forth the description of the selected locality and certify that it would meet those criteria that had been specifically established. Upon application a provisional status would be granted to the area subject to the objections of other states or parties to the conflict. Here a distinction would have to be made between applications made during peace and those made during the course of an actual conflict. In the case of the former, applications would be subject to the objections of all parties to the convention whereas in the latter case they would be subject to the objections only of the other parties to the conflict. In the event that any objection could not be negotiated it would then become subject to binding arbitration.

The Secretary General of the United Nations in his first report on "Respect for Human Rights in Armed Conflicts"²²⁸ made positive suggestion for the establishment of permanently

designated sanctuaries and refuges. The International Committee of the Red Cross in its preliminary work for the 1971 Conference of Governmental Experts did not present any proposals concerning this matter.²²⁹ The first draft protocol prepared for the 1972 conference contained two articles which dealt with "Non-defended localities (open cities)"²³⁰ and "Neutralized Localities".²³¹ Both articles prohibited certain actions within the localities on which the parties "have conferred by agreement" this special status. Thus these recent proposals suffer namely that hostile parties must agree during the conduct of the hostilities to grant to the other party something which might not be in their most immediate interest. The language must be strengthened so that the establishment of such essential areas does not depend upon the whim of the enemy.²³²

C. Enlightenment of the World Community

The Civilian Convention of 1949 provides:

The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the texts of the present conventions as widely as possible in their respective countries and in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof become known to the entire population.²³³

The question of the dissemination of the texts of such international instruments of a humanitarian nature was the subject of special comment by the Secretary General of the United Nations in his report on Respect of Human Rights in Armed Conflicts.²³⁴ It was the opinion of the Secretary General that the dissemination of such texts as well as

regulations adopted at the local level would "appear to be particularly significant."²³⁵ Today the efforts of the United States are towards the education of the military community in their role in the laws of war. More effort must be placed on making the entire population aware of all the humanitarian considerations which are set forth in existing laws and also of those being proposed. Such efforts are in fact being made in some countries. It is significant that the Federal Republic of Germany, in commenting to the Secretary General's suggestion stated that it was their opinion that "particular attention and support"²³⁶ should be given such proposals and that

teaching aids for the instruction of military personnel in international law-which might be supplemented by those developed for use in civilian education programmes-are a most suitable means for imparting better knowledge of the pertinent views held in foreign countries and of identifying the points at issue.²³⁷

Professor Falk in stating that the present rules "need to be restated and the climate for their effective implementation needs to be created"²³⁸ which would carry the need for education to a higher level. Professor Falk calls for the convening of a second series of Hague Conferences. Such conferences would, in the words of Professor Falk, be "political occasions . . . on which a new moral and legal consensus is formed."²³⁹

Notwithstanding efforts currently being made, new efforts should be undertaken to educate the community as a whole. Such an educational process should be conducted on a dual basis. First there should be adequate attempts made to make the public aware of what protections currently exist. Only through such

an awareness can the public become an effective check to insure compliance with the established rules of protection by the world community leaders. Secondly, the defects of the existing regulations must be emphasized in order to formulate effective support for change in a positive direction.

D. The Need for Active and Passive Precaution to Insure the Protection of the Civilian

The efforts of the past have been aimed at providing adequate "active" precautionary measures designed to spare the civilian population. That is, those types of measures which provide that a party launching an attack must take certain affirmative actions to insure that attacks are not launched against civilian objects. Article 26 of the IVth Hague Convention of 1907 provided that the "officer in command of an attacking force must . . . do all in his power to warn the authorities". But the obligation on the part of the authorities is just as great. The Secretary General in his studies and the International Committee of the Red Cross in their preliminary works have also approached this problem. The Secretary General has stated that the substance of any standard minimum rules for the protection of civilians must establish norms relating, inter alia, to

the taking of all necessary steps by parties to the conflict to protect the civilian population subject to their authority, from the dangers to which they might be exposed in an attack, in particular, by removing them from the vicinity of objectives of military importance likely to be attacked.²⁴⁰

Modern warfare renders difficult the protection of

civilians. The military arm of a party to a conflict must exercise that degree of caution which will allow for the reduction of suffering to the civilian population. But this protection must be two edged. Those who have control over the population must take affirmative measures to insure that the civilian is not "in the line of fire". This was appreciated by the International Committee of the Red Cross in their draft protocol.²⁴¹

The problems in placing such a burden upon the authority in control of the population are great. That authority may not have the means to evaluate the population. Military objects, by their nature, may not be removable from centers of population. In noninternational armed conflicts definite fronts may not be established making the problem of the removal of persons or objects almost impossible. Finally, in occupied areas, a mandate for the removal of personnel may be greatly abused. Notwithstanding the objections, affirmative steps must be taken to place a burden upon those in control of the civilian population to insure that they are not placed in areas of maximum hazard.

E. The Need to Revitalize the Concept of the Protecting Power

The system of Protecting Powers is deeply embedded in the laws of war. Yet the system as presently established has not been successful. Protecting powers have not been appointed because parties to a conflict have been unable to agree upon who should serve or the conflict has been of such a short

duration that cease fires have been arranged before the appointments could be made. Therefore a new system is necessary. Such a system should have an automatic execution feature designed to eliminate the inadequacies of the present system. In order to be effective the system should incorporate the following features.

1. All parties to the convention would in time of peace draw up a list of states which would be acceptable to them as Protecting Powers. Such lists would then be submitted to an impartial international agency such as the ICRC. The designated agency would keep such lists in confidence. In the event of a conflict between parties to the convention this agency would advise the parties of those States which were mutually agreeable to them and negotiate the final selection.

2. In the event agreement could not be reached within a designated period of time or in the event there were no mutually acceptable states on the lists of the parties then there would be an automatic acceptance of the International Committee of the Red Cross as a substituted Protecting Power.

3. In the event of armed conflict not of an international nature or between a state not party to the convention the International Committee of the Red Cross or "similar humanitarian organization" would be empowered to act. Such a feature could be made possible through the general acceptance of such a convention feature so that it would have the effect of customary international law.

Over the course of the years nations have gathered together to formulate rules that would diminish the suffering

that was inflicted on all participants during the course of an armed conflict. These efforts have produced numerous international conventions designed to provide protection to the combatant victims. But in the area of protection for the civilian victims of armed conflict, the protection has been slow in coming forth. It was not until 1949 that the civilian population was even considered as warranting protection in their own right. We have seen that the protection granted, while a beginning, is lacking in several areas. Recent proposals presented during the 1972 Conference of Governmental Experts will help to eliminate some of the deficiencies but these proposals do not go far enough.

It is idealistic to presume that nations can agree on a system of protections that will provide optimum protection for all the victims of war. Nevertheless it is necessary to begin the consideration of these areas with the most far reaching goals possible. For only with the idea of arriving at a system which will provide the most utopian protection possible will the ultimate guarantees provided by those minimum protections effectively shield the noncombatant population from the dangers of war.

FOOTNOTES

¹The terms "civilian population" and "noncombatants" are used interchangably to include all peaceful inhabitants not attached to a accompanying the armed forces..

²Commentary: IV Geneva Convention 5 (J. Pictet ed 1958).

³23 Encyclopedia Britannica 201 (1972); the U.S. Senate Judiciary subcommittee on refugees estimated that the total civilian war casualties in South Vietnam from March 30, 1972, to mid-June 1972 was nearly 80,000. The Evening Star (Washington, D.C.) June 16, 1972, A-6, col. 5 & 6.

⁴For a summary of the contents of the Civilian Convention of The 1949 Geneva Conventions see G. Draper, the Red Cross Conventions 27 (1958).

⁵Though internal conflict is not a new phenomenon in the international legal order - brothers have been fighting each other since Cain slew Abel - it has swollen into epidemic proportions in the last two and a half decades. One observer culled from the pages of the New York Times, well over 1,200 unequivocal examples of internal war between 1946 and 1959. Bond, International Conflict and Article Three of the Geneva Conventions, 48 Den L. J. 263 (1971).

⁶The most minimal reading of the customary rules of international law prohibit the acts which took place at Son My, and yet they happened. Rules of international law do not insure conforming conduct . . . Falk, Son My: War Crimes and Individual Responsibility, U. Tol. L. Rev. 21, 21-2 (Fall & Winter 1971); Lauterpacht, The Problem of the Revision of the Law of War, 29 Brit. Y. B. Int'l L. 360, 363 (1952).

⁷Lauterpacht, The Problem, supra note 6 at 364; It is a truism that treaties which are designed to have future applicability are drafted in terms of problems which have arisen in the past. Thus the Hague Conventions tended to reflect the problems which arose during the Franco Prussian conflict of the 1870's; the Geneva Conventions of 1929 addressed themselves to concepts and techniques of World War I; the Geneva Conventions of 1949 were concerned with matters of controversy arising from World War II. Shull, Counter Insurgency and the Geneva Conventions, 3 Int'l L. 49, 50 (1968); 10 Whiteman, Digest of International Law 136 (1968).

⁸ Gottlieb, International Assistance to Civilian Populations in Armed Conflicts, 4 N.Y.U.J. Int'l. L. & Pol 403 (1971); Factors leading to this decline as listed by Mr. Gottlieb are:

- (1) Modern warfare techniques cannot differentiate between combatant and noncombatant
- (2) The concept of "peoples wars" put men, women and children against the technology of the adversary
- (3) The guerrilla ideology of terror tactics
- (4) The media bring the horror to the home
- (5) Conditions in some developing countries are so bad that they submit to terror without outcry
- (6) Totalitarian regimes
- (7) "Just" political struggles
- (8) Fear of involvement in foreign wars,

ID at 404; c.f. 39 Am. J. Int'l. L. 734, 735 (1945).

⁹ Nurick, The Distinction Between Combatant and Non-Combatant in the Law of War, 39 Am. J. Int'l. L. 680, 681 (1945).

¹⁰ W. DeHart, Observations on Military Law 37 (1862).

¹¹ J. Fuller, The Generalship of Alexander The Great 63 (1958).

¹² Kunz, The Chaotic Status of the Laws of War and the Urgent Necessity for their Revision, 45 Am. J. Int'l. L. 37, 59 (1951).

¹³ U.S. Dep't. of Army, FM 27-10, The Law of Land Warfare, par 2 (1956).

¹⁴ MILITARY NECESSITY. The principle of military necessity permits a belligerent to apply only that degree and kind of regulated force, not otherwise prohibited by the laws of war, required for the partial or complete submission of the enemy with the least possible expenditure of time, life or physical resources.

HUMANITY. The principle of humanity prohibits the employment of any kind or degree of force not necessary for the purpose of the war.

CHIVALRY. The principle of humanity forbids the resort to dishonorable means, expedients or conduct. see. U.S. Dep't. of the Navy, NWIP 10-2, Laws of Naval Warfare, art. 220 (1955).

¹⁵ Gutteridge, The Geneva Conventions of 1949, 26 Brit. Y.B. Int'l. L. 294, 319 (1949).

¹⁶ ID; Professor Lauterpacht summarizes the development as follows:

"The distinction between armed forces and civilians is generally appreciated to have been affected by

- i The growth of the number of combatants

ii The growth of the number of noncombatants engaged in war preparations

iii The development of aerial warfare

iv Economic measures which result in the civilian population being no longer immune from the hardships and privation of war.

v The advent of totalitarian states in which the life and property of the individual are entirely dominated by the state and utilized in a rigidly regimented fashion for the purpose of the war economy.

see Oppenheim's International Law 207-8 (Lauterpacht ed, 7th Ed 1957) hereafter cited as Oppenheim - Lauterpacht..

¹⁷ R. Baxter, The Duty of Obedience to the Belligerent Occupant, 27 Brit. Y.B. Int'l. L. 235, 253 (1950).

¹⁸ It is believed that, if the facts of war, especially when viewed in the light of developments during the two World Wars, are taken into consideration without prejudice, there ought to be no doubt that the British and American view is correct. It is impossible to sever the citizens from their state and the outbreak of war between two states cannot but make their citizens enemies. Oppenheim - Lauterpacht, *supra* note 16 at 205..

¹⁹ M. Greenspan, The Modern Law of Land Warfare 53 (1959); Lauterpacht, *supra* note at 363-78; Nurick, *supra* note 6 at 680; Oppenheim - Lauterpacht *supra* note 16 at 524-30..

²⁰ Baxter, *supra* note 17 at 258.

²¹ Greenspan, *supra* note 19 at 53.

²² Oppenheim - Lauterpacht, *supra* note 16 at 524.

²³ Pictet, Armed Conflict: Laws and Custom, 1 The Review 22, 24 (March 1969).

²⁴ H. Morgenthau, Politics Among Nations 230 (4th Ed 1967).

²⁵ Pictet, The Review, *supra* note 23 at 26.

²⁶ ID at 27.

²⁷ For Text of St. Petersburg Declaration see U.S. Dep't. of Army Pam. DA 27-162-2 at 277 (1962); R. Phillimore, International Law 160-2 (3rd Ed 1885).

²⁸ ID.

²⁹ The St. Petersburg Declaration is the "First formal international act restricting the use by belligerents of the instruments they may employ to injure the enemy." J. Garner, International Law 45 (1925); This conference marks the first

appearance of rules based upon the principle that the illegality of weapons should be measured by the amount of suffering that they inflict. T. Lawrence, Principles of International Law 530 (7th Ed 1925).

³⁰ Morgenthau, supra note 24 at 230.

³¹ U.S. War Dep't. Gen. Order No. 100, AG Office (1863); Draper, supra note 4 at 4.

³² Nurick, supra note 9 at 631.

³³ A. Higgins, The Hague Peace Conferences 256 (1909).

³⁴ T. Taylor, Nuremberg and Vietnam: An American Tragedy 23 (1970).

³⁵ U.S. Dep't. of Army, FM 27-10, The Law of Land Warfare (1956).

³⁶ Treaty for Renunciation of War as a National Policy (Kellogg Briand Pact), August 27, 1928 (1929), 46 STAT 2343, T.S. No. 796, 94 L.N.T.S. 57.

³⁷ ID at Preamble.

³⁸ Draper, supra note 4 at 3 & 4.

³⁹ ID at 4.

⁴⁰ Convention for Amelioration of the Conditions of the Wounded on the Field of Battle, opened for signature August 22, 1864, 1 March 1882, 22 STAT 940, T.S. No. 377.

⁴¹ Draper, supra note 4 at 3.

⁴² Higgins, supra note 33 at 257.

⁴³ ID at 257-8.

⁴⁴ Draper, supra note 4 at 4; J. Spaight, War Rights on Land 6 (1911).

⁴⁵ Draper, supra note 4 at 4.

⁴⁶ Pictet, The Review, supra note 23 at 28; M. Royse, Aerial Bombardment and the International Regulation of Warfare 22-50 (1923); I The Hague Peace Conferences of 1899 and 1907 at 83 (J. Scott ed (1909)).

⁴⁷ Pictet, The Review, supra note 23 at 28.

⁴⁸ ID; The second conference was proposed by the United States although it was officially called by the Imperial Russian Government. I The Hague Peace Conferences, supra note 46 at 89-95.

⁴⁹ IV Hague Convention on Laws and Customs of War on Land, October 18, 1907, 36 STAT 2277, T.S. No. 539 (hereinafter cited as IV Hague Convention); I The Hague Peace Conferences, supra note 46 at 136.

⁵⁰ Kunz, The Chaotic Status, supra note 12 at 37, 40; 37, 40 (1951); These codifications presupposed the doctrines of democracy, capitalism, economic liberalism, the principle of the sanctity of private property, the strict distinction between private enterprise and economic activities by the states, the Rousseau - Portales doctrine and the strict distinction between armed forces and civilian population. ID.

⁵¹ Pictet, Commentary IV, supra note 2 at 5.

⁵² Morgenthau, supra note 24 at 218.

⁵³ Pictet, Commentary IV, supra note 2 at 27.

⁵⁴ Farer, Humanitarian Law and Armed Conflicts, 71 Col. L. Rev. 37, 49 (1971).

⁵⁵ Although the ICRC was the prime mover of this conference they were unable to call a diplomatic conference since they were only an international organization. Therefore, the Swiss government, acting in effect for the ICRC, called for the conference.

⁵⁶ Lauterpacht, The Problems, supra note 6 at 53.

⁵⁷ Pictet, Commentary IV, supra note 2 at 8.

⁵⁸ Geneva Convention I, opened for signature August 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 131.

⁵⁹ Geneva Convention II, opened for signature August 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85.

⁶⁰ Geneva Convention III, opened for signature August 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135.

⁶¹ Draper, R. C. Convention, supra note 4 at 1.

⁶² Geneva Convention IV, opened for signature August 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287. (hereinafter cited as the Civilian Convention).

⁶³ Pictet, The Review, supra note 23 at 31.

⁶⁴ Thus, for instance, although the Regulations attached to Hague Convention No. IV respecting the laws and customs of war on land protected the civilian population in occupied territory, they did so, in Articles 42-56, in somewhat general outline. Lauterpacht, The Problem, supra note 6 at 360.

⁶⁵ Pictet, The Review, supra note 23 at 31; The full title of the Civilian Convention is misleading. It is not, as might seem to be implied, a convention for the protection of all civilians in all circumstances in time of war. Gutteridge, The Geneva Conventions, supra note 15 at 319.

⁶⁶ Lauterpacht, The Problem, supra note 6 at 361.

⁶⁷ ID.

⁶⁸ Kunz, The Chaotic Status, supra note 12 at 59; see Oppenheim - Lauterpacht, supra note 16 at 452 fn. 1 for a breakdown of the various subjects of the convention; see also Pictet, The New Geneva Conventions for the Protection of War Victims, 45 Am. J. Int'l. L. 462, 473-4 (1951).

⁶⁹ emphasis added;

the mandatory provisions include

- (1) particular protection and respect for Sick and wounded and expectant mothers
- (2) Civilian hospitals are not the object of attacks
- (3) The use of the Red Cross insignia
- (4) The use of the Red Cross insignia on aircraft
- (5) Free passage of supplies
- (6) protection of orphaned children

see Oppenheim - Lauterpacht, supra note 16 at 364.

⁷⁰ M. McDougal and F. Feliciano, Law and Minimum World Public Order 42 (1961).

⁷¹ Stowell, The Laws of War and the Atomic Bomb, 39 Am. J. Int'l. L. 784 (1945).

⁷² U.S. Dep't. of the Navy, NWIP 10-2, Laws of Naval Warfare, art. 221 (1955); Recent developments in the methods and weapons of warfare have decidedly affected this once fundamental distinction between combatants and noncombatants. Oppenheim - Lauterpacht, supra note 16 at 207-8.

⁷³ U.S. Dep't. of the Navy, NWIP 10-2, Laws of Naval Warfare, art. 221 b. (1955).

⁷⁴ Oppenheim - Lauterpacht, supra note 16 at 525.

⁷⁵ U.S. Dep't. of the Navy, NWIP 10-2, Laws of Naval Warfare, pg. 2-9 fn 13 (1955).

⁷⁶ Oppenheim - Lauterpacht, supra note 16 at 525; International law protects noncombatants from deliberate bombardment from the air directed primarily against them . . . ID at 526; but see ID at 526 ffl. Experience has shown that in the absence of the restraining influence of effective reprisals belligerents have not hesitated to make use of their air superiority against civilian populations.

77 IV Hague Convention Art 45.

78 ID at art 46.

79 ID at art 47.

80 ID at art 50.

81 Draper, Red Cross Conventions, supra note 4 at 28.

82 R. Rowley, A Juridical Inquiry Into The Applicability of the 1949 Prisoner of War and Civilian Conventions to the Israeli / Palestinian People Coercion Situation 74-5 (1970 an unpublished thesis G. W. Univ. Law School).

83 Gutteridge, The Geneva Conventions, supra 15 note at 320.

84 Articles 13 to 26 of the Conventions do, however, apply to a greater range of persons . . . covering the whole population of the country in conflict. Greenspan, supra note 19 at 158; Gutteridge, The Geneva Conventions, supra note 15 at 320.

85 Gutteridge, The Geneva Conventions, supra note 15 at 321.

86 Greenspan, supra note 19 at 168.

87 McDougal and Feliciano, supra note 70 at 568.

88 IV Hague Convention on Laws and Customs of War on Land, October 18, 1907, 36 STAT 2277, T.S. No. 539 at art 22.

89 IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, open for signature August 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 237 at Art. 15.

90 McDougal and Feliciano, supra note 70 at 571.

91 III Hague Convention on Opening of Hostilities, October 18, 1907, 36 STAT 2259, T.S. No. 538.

92 Article 3 is an article common to all four of the 1949 Geneva Conventions which provide inter alia for certain minimum protections including that

- (1) Persons taking no active part in the hostilities shall in all circumstances be treated humanely,
- (2) That the follows acts are prohibited
 - (a) violence to life and person
 - (b) taking of hostages
 - (c) outrages on personal dignity

93 Bond, International Conflict, supra note 5 at 285.

⁹⁴ 1 M. Whiteman, Digest of International Law 345 (1963).

⁹⁵ The Federal Constitution of the Swiss Confederation, Art 102(9) (December, 1964).

⁹⁶ 1 G. Hackworth, Digest of International Law 67 (1940).

⁹⁷ see Frye, Characteristics of Recent Arms Control Proposals and Agreements in Arms Control, Disarmament and National Security 68 (D. Brennan ed 1961); White House Disarmament Staff, Documents on Disarmament Matters 1-42 (1957).

⁹⁸ U.S. Dep't. of Army Pam. DA 27-162-2 at 277 (1962).

⁹⁹ supra footnote 49 and accompanying text.

¹⁰⁰ The contracting parties agreed to prohibit, for a term of five years, the launching of projectiles and explosives from balloons or by other new methods of a similar nature. Mallison, The Laws of War and the Juridical Control of Weapons of Mass Destruction in General and Limited Wars, 36 Geo. Wash. L. Rev. 308 (1963); Royse, supra note 46 at 22-50; II The Hague Peace Conferences of 1899 and 1907 at 152 (J. Scott ed 1909).

¹⁰¹ ID at 50-61.

¹⁰² IV Hague Convention on Laws and Customs of War on Land, October 18, 1907, 36 STAT 2277, T.S. No. 539 at art 23.

¹⁰³ Royse, supra note 46 at 141; Borchard, The Atomic Bomb, 40 Am. J. Int'l. L. 161, 165 (1946); J. Stone, Legal Controls of International Conflict 551 (1954).

¹⁰⁴ Lauterpacht, The Problem, supra note 6 at 365.

¹⁰⁵ McDougal and Feliciano, supra note 70 at 573.

¹⁰⁶ Lauterpacht, The Problem, supra note 6 at 365.

¹⁰⁷ Taking this article (Article 28) in conjunction with Articles 33 and 34 . . . which prohibit reprisals against protected persons and the taking of hostages, such practices known as "prophylactic reprisals," whereby prominent inhabitants are placed on the engines of trains in occupied territory to insure the lines of communication against attack by the inhabitants of that territory, are definitely illegal. Greenspan, supra note 19 at 169.

¹⁰⁸ U.S. Dep't. of Army, FM 27-10, The Law of Land Warfare, par. 56 (1956).

¹⁰⁹ IV Hague Convention art 25.

¹¹⁰ The Paquete Habana 175 US 677 (1900).

¹¹¹ Alford, Modern Economic Warfare, International Law Studies 1963, U.S. Naval War College 356 (1967); Mallison, Studies in the Law of Naval Warfare, International Law Studies 1966, U.S. Naval War College 127 (1968).

¹¹² Pictet, Commentary IV, supra note 2 at 613.

¹¹³ ID at 617.

¹¹⁴ ID at 6.

¹¹⁵ Civilian Convention, art 3.

¹¹⁶ Of the 159 articles in the civilian convention twelve (arts 1-12) are general provisions, fourteen (arts 13-26) are on general protection, fifty two (arts 27-78) are on the status of aliens and occupied territories and sixty three (arts 79-141) are on internees..

¹¹⁷ S. C. Res 237, 22 SCOR 1361st meeting (1967), at 22 GAOR supp 2 A/6702.

¹¹⁸ The Final Act of The International Conference on Human Rights (Proclamation of Teheran) May 13, 1968, GAOR A/Conf. 32/41; see also Hewitt, Respect For Human Rights in Armed Conflicts, 4 N.Y.U. J. Int'l. L. & Pol. 41, 42-5 (1971).

¹¹⁹ The twenty sixth session of the United Nations 1968.

¹²⁰ G. A. Res 2444, 23 U.N. GAOR Supp 18 at 50, U.N. Doc. A/7218 (1968).

¹²¹ ID at para 2.

¹²² Sec Gen Report, Respect for Human Rights in Armed Conflicts, U.N. Doc. A/7720 (1969), hereinafter referred to as Secretary General's first report..

¹²³ G. A. Res 2597, 24 U.N. GAOR Supp 30 at 62, U.N. Doc. A/7630 (1969).

¹²⁴ Sec Gen Report, Respect for Human Rights in Armed Conflicts, U.N. Doc. A/8052 (1970) hereinafter referred to as Secretary General's second report.

¹²⁵ ID at para 37; The three principles set forth in Resolution 2444 (XXIII) are:

(1) That the right to adopt means to injure the enemy is not unlimited

(2) That it is prohibited to launch attacks against civilian populations

(3) That the distinction between those taking part in hostilities and civilians must be maintained at all times..

126 Secretary General's second report, *supra* note 124 at para 41.

127 ID at para 42.

128 The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, U.N.T.S. 3511 (1956).

129 see Art 23, First Geneva Convention 1949, Art 12 of Civilian Convention.

130 Secretary General's second report, *supra* note 124 at para 53 and 59.

131 ID at para 62.

132 ID at para 148.

133 G. A. Res 2674, 25 U.N. GAOR Supp 28 at 75, U.N. Doc. A/8028 (1970).

134 L.N.T.S. 2138 (1929).

135 G. A. Res. 2675, 25 U.N. GAOR Supp 28 at 76, U.N. Doc. A/8028 (1970).

136 G. A. Res. 2677, 25 U.N. GAOR Supp 28 at 77, U.N. Doc. A/8028 (1970).

137 Sec Gen Report, Respect for Human Rights in Armed Conflict, U.N. Doc. A/8370 (1971), hereinafter referred to Secretary General's third report.

138 Res. XIII, XXIst International Conference of the Red Cross (1969), see Secretary General's first report, *supra* note 122, annex 1 sec D for text.

139 see Secretary General's third report, *supra* note 137 for list of invitees.

140 ICRC, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva 24 May - 12 June 1970- Report on the Work of the Conference, 1 (1971) hereinafter cited as ICRC Conference Report.

141 Document I: Introduction (CE/1b);
 Document II: Measures intended to reinforce the implementation of the existing law (CE/2b);
 Document III: Protection of the civilian population against dangers of hostilities (CE/3b);

Document IV: Rules relative to behavior of combatants (CE/4b);
Document V: Protection of victims of non-international armed conflicts (CE/5b);
Document VI: Rules applicable in guerrilla warfare (CE/6b);
Document VII: Protection of the wounded and sick (CE/7b);
Document VIII: Annexes (CE/8b):.

¹⁴² Secretary General's third report, supra note 137 at para 20.

¹⁴³ ICRC Conference report, supra note 140 at 3.

¹⁴⁴ ID at 18.

¹⁴⁵ ID.

¹⁴⁶ ID.

¹⁴⁷ ID.

¹⁴⁸ ID.

¹⁴⁹ ID at 19.

¹⁵⁰ ID at 117.

¹⁵¹ ICRC, Con. Gov't. Experts, Geneva, 1971, Doc. CE/3b.

¹⁵² CE/3b at 1.

¹⁵³ CE/3b at 7.

¹⁵⁴ CE/3b at 8.

¹⁵⁵ CE/3b at 11-12.

¹⁵⁶ Illicit objectives are those which it is forbidden to attack. A term covering both persons and objects.

¹⁵⁷ CE/3b at 24-5.

¹⁵⁸ CE/3b at 31; see Art 27, III Hague Regulation (1907).

¹⁵⁹ CE/3b at 33; see G. A. Res. 2444, 23 U.N. GAOR Supp 18 at 50, U.N. Doc. A/7213 (1968) and G. A. Res. 2675, 25 U.N. GAOR Supp 23 at 76, U.N. Doc. A/3023 (1970).

¹⁶⁰ CE/3b at 33; see art 28 a/ Civilian Convention.

¹⁶¹ CE/3b at 33.

162 Secretary General's third report, *supra* note 137 at para 80; see also CE/3b at 89-102.

163 Secretary General's second report, *supra* note 124 at para 41.

164 CE/3b at 8.

165 ID at 130; Secretary General's third report, *supra* note 137 at para 36.

166 Secretary General's second report, *supra* note 124 at 38.

167 ID at 39.

168 ID.

169 CE/3b at 26.

170 See Art 26 IV Hague Convention 1907 and Art 19, Civilian Convention 1949.

171 Secretary General's second report, *supra* note 124 at para 42.

172 CE/3b at 135-7.

173 ID.

174 ID.

175 ID.

176 *supra* note 140.

177 ICRC, Conf. Gov't. Experts, Geneva 1972, I Basic Texts 1 (1972) hereinafter cited as Basic Texts, First Draft Protocol or Second Draft Protocol.

178 ID.

179 ID.

180 ICRC, Questionnaire Concerning Measures Intended to Reinforce the Implementation of the Geneva Conventions of August 12, 1949, D-0-1252/b/e, I (April, 1972).

181 Basic texts, *supra* note 177 at 5-34.

182 ID at 35-47.

183 ID at 2.

184 ID.

185 Part I General Provisions, Part II Wounded, sick and shipwrecked persons, Part III Combatants, Part IV Civilian population, Part V Execution of the convention and present protocol and Part VI Final provisions..

186 Article 2, para 1, 1949 Geneva Conventions.

187 Article 2, para 2, 1949 Geneva Conventions.

188 Art 10 "The High Contracting Parties may at any time entrust . . ."; Art 9 "The present convention shall be applied . . ."; see Pictet, Commentary IV, *supra* note 2 at 86-9.

189 Basic texts, *supra* note 177 at Art 10; see also ICRC, Conf. Gov't. Experts, Geneva 1972, II Commentary, Part one at 24-6 (1972) hereinafter cited as ICRC II Commentary, part one..

190 see *supra* note 65.

191 Basic texts, *supra* note 177, art 41; see also Secretary General's second report *supra* note 124 and CE/3b.

192 ICRC II Commentary, part one, *supra* note 189 at 79; As its commentary indicates the Civilian Convention of 1949 does not deal, except briefly in Part II, with the protection of civilians from hostilities, see Pictet, Commentary IV, *supra* note 2..

193 Art 25, IV Hague Regulation (1907); Arts 27, 31, 32 and 33 Civilian Convention (1949); G. A. Res. 2444, 23 U.N. GAOR Supp 18 at 50, U.N. Doc. A/7218 (1968); G. A. Res. 2675, 25 U.N. GAOR Supp 28 at 76, U.N. Doc. A/8028 (1970)..

194 Basic Texts, *supra* note 177 Art 47 First Draft Protocol "Objects of a civilian character shall never be attacked, provided they are not used either directly or mainly for a military purpose" ..

195 see *supra* notes 170-5 and accompanying text; see also ICRC II Commentary, part one, *supra* note 189 at 100.

196 ICRC II Commentary part one, *supra* note 189 at 100.

197 The principle of humanity prohibits the employment of kind or degree of force not necessary for the purpose of war. U.S. Dep't. of Navy, NWIP 10-2, Laws of Naval Warfare, para 220b; "Proportionality" like "necessity" is customarily established as a prerequisite for characterizing coercion as lawful defense. M. McDougal and F. Feliciano, *supra* note 70 at 241..

198 Basic Texts, First Draft Protocol, *supra* note 177 at art 50.

199 Removal of the civilian population is subject to the provisions of article 49 of the civilian convention which prohibits the forced transfer of protected persons in occupied territories. see Basic Texts, First Draft Protocol, supra note 177 at art 51.

200 ICRC, II Commentary, supra note 189 at 106.

201 Basic Texts, First Draft Protocol, supra note 177 at art 53.

202 ID at art 54.

203 ID at art 55.

204 1949 Civilian Convention arts 14, 21, 23, 24, 38(5), 50, 68(4) and 140; see also G. A. Res. 1386, 14 U.N. GAOR Supp 16 at 19, U.N. Doc. A/4354 (1959) (Declaration of the Rights of the Child)..

205 Basic Texts, First Draft Protocol, supra note 177 at art 63.

206 Basic Texts, Second Draft Protocol, supra note 177 at art. 1.

207 ICRC, Conf. Gov't. Experts, Geneva 1972, II Commentary, Part two, 35 (1972) hereinafter cited as ICRC II Commentary Part two.

208 see supra note 196.

209 Any person who is not a member of the armed forces and who, moreover, does not take a direct part in the hostilities is considered to be a civilian..

210 First Proposal.

211 Second Proposal.

212 IV Hague Convention of 1907 art 25; third Geneva Convention of 1949, arts. 19(3) and 23(1); Civilian Convention of 1949, arts. 27, 28, 31, 32 and 33; G. A. Res. 2444, 23 U.N. GAOR Supp 18 at 50, U.N. Doc. A/7218 (1968); G. A. Res. 2675, 25 U.N. GAOR Supp 28 at 76, U.N. Doc. A/8028 (1971).

213 see supra notes 170-5 and accompanying texts.

214 ICRC II Commentary, Part two, supra note 207 at 64.

215 A careful legal appraisal should avoid automatically ruling out the drastically restricted use of Naval Power either in limited war or coercive situations short of limited war. Mallison, Studies, supra note 111 at 127; The effectiveness of blockade in naval strategy has been demonstrated by history.

In the two great wars of the past half century it was demonstrated that the long distance blockade can be employed effectively to strangle the flow of supplies to an enemy. Powers, Blockade: For Winning Without Killing, U.S. Naval Institute Proceedings, vol. 84 No. 3 at 61, (1958)..

216 Convention on Genocide, opened for signature December 9, 1948, U.N.T.S. No. 1021.

217 see *supra* note 3

218 Nurick, *supra* note 9 at 696.

219 Civilian Convention of 1949, arts 13-26.

220 Lauterpacht, The Problem, *supra* note 6 at 362.

221 Falk, Son My, *supra* note 6 at 38.

222 U.N. CHARTER art. 2, para. 4.

223 U.N. CHARTER art. 51.

224 U.N. CHARTER art. 2, para. 7.

225 Civilian Convention of 1949, art. 14, para. 2.

226 Civilian Convention of 1949, art. 15.

227 The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, U.N.T.S. 3511 (1956).

228 Secretary General's first report, *supra* note 122.

229 CE/3b at 82-102.

230 Basic Texts, First Draft Protocol, *supra* note 177 at art. 53.

231 ID at art. 54.

232 M. McDougal and F. Feliciano, *supra* note 70 at 76-7.

233 Civilian Convention of 1949, art. 144; see also First Convention of 1949, art. 47, Second Convention of 1949, art. 48 and third Convention of 1949, art. 127 for similar provisions concerning their respective texts.

234 Secretary General's first report, *supra* note 122, para. 118 and Secretary General's second report, *supra* note 124, para 251.

235 Secretary General's second report, *supra* note 124, para 251.

²³⁶ Sec. Gen. Report, Respect for Human Rights in Armed Conflicts, Comments of Governments, U.N. Doc. A/8313 at 37 (1971).

²³⁷ ID.

²³⁸ Falk, Son My, supra note 6 at 39.

²³⁹ ID.

²⁴⁰ Secretary General's second report, supra note 124 at 17.

²⁴¹ Basic Texts, First Draft Protocol, supra note 177 at art 51..

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